TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 21.

THE PEOPLE OF THE STATE OF NEW YORK, EX REL. PARKE DAVIS & COMPANY, PLAINTIFFS IN ERROR,

vs.

JAMES A. ROBERTS, COMPTROLLER OF THE STATE OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED AUGUST 20, 1898.

(16,368.)

(16,368.)

SUPREME COURT OF THE UNITED STATES.

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JAMES A. ROBERTS, COMPTROLLER OF THE STATE OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 19, 1897.

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a Court of Appeals.

PEOPLE *ex Rel.* PARKE DAVIS & COMPANY, Relator, Appellant,
vs.
JAMES A. ROBERTS, as Comptroller, &c., Respondent.

Papers on Certiorari on Appeal from Order of General Term Sustaining Comptroller.

James McKeen, attorney for relator, appellant, 32 Nassau street, New York city.

T. E. Hancock, attorney general, for respondent, capitol, Albany, N. Y.

b Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 9th day of June, in the year of our Lord one thousand eight hundred and ninety-six, before the judges of said court.

Witness the Hon. Charles Andrews, chief judge, presiding.

GORHAM PARKS, *Clerk.*

Copy.

Remittitur June 10th, 1896.

c THE PEOPLE *ex Rel.* PARKE DAVIS & COMPANY, Appellant,
ag'st
JAMES A. ROBERTS, as Comptroller, &c., Respondent.

Be it remembered that on the 19th day of May, in the year of our Lord one thousand eight hundred and ninety-six, The People *ex rel.* Parke Davis & Company, the appellant in this action, came here into the court of appeals, by James McKeen, its attorney, and filed in the said court a notice of appeal and return thereto from the order of the general term of the supreme court, third judicial department, and James A. Roberts, as comptroller, &c., the respondent in said action, afterwards appeared in said court of appeals by T. E. Hancock, attorney general, his attorney.

Which said notice of appeal and the return thereto filed as aforesaid are hereunto annexed.

d Whereupon the said court of appeals, having heard this cause argued by Mr. James McKeen, of counsel for the appellant, and by Mr. T. E. Hancock, attorney general, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the general term of the supreme court appealed from herein to this court be, and the same is hereby, affirmed with costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this court, be remitted to the said supreme court, there to be proceeded upon according to law.

e Therefore, it is considered that the said order be affirmed with costs as aforesaid.

And hereupon, as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

GORHAM PARKS,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *June 10th*, 1896.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein, attached thereto.

[L. S.] GORHAM PARKS, *Clerk.*

1 New York Supreme Court.

In the Matter of the Application of PARKE, DAVIS & COMPANY for a Writ of Certiorari.

To the supreme court:

The petition of John Clay, as manager of Parke, Davis & Company, making this petition on behalf of such company as such manager, respectfully shows to the court:

That Parke, Davis & Company are a corporation created by and under the laws of the State of Michigan.

That said corporation is engaged in the business of manufacturing chemical and medicinal preparations from crude drugs and other materials by various processes, and in selling the products of this manufacture.

That its plant and machinery for such manufacture are at Detroit, Michigan, where substantially all its manufacturing is done.

That to facilitate the sale and distribution of its manu-
2 factured products in the eastern part of the country it has a warehouse and depot in the city of New York under the charge of your petitioner, and there keeps on hand varying quantities of its manufactured products, which are there sold at wholesale in original packages.

That all such products of its manufacture are consigned to your petitioner as such manager.

That the business of so selling such manufactured products is carried on in all respects like the ordinary sales of consigned goods, except that your petitioner is paid a salary instead of a commission, and the corporation do not conduct a jobbing business in purchase and sale of products other than of their own factory.

Though your petitioner does incidentally in his name import crude drugs in considerable quantities from foreign countries at

the port of New York, such crude products being in large part sent to the Detroit factory for use, but to some extent such crude drugs, and to a small extent crude drugs purchased in the New York market, are sold again, all such sales being in the original packages.

That a debit and credit account is kept by your petitioner with such corporation, and he accounts to them for the sales made at or through the New York office. A very large portion of such sales are made by traveling agents in States other than New York, in this section of the United States, the accounts thereof for convenience, being kept by your petitioner at the New York office. No bank account is or has been kept by the corporation in the State of New York, the only bank account being the individual account of your petitioner.

A large part of the sales made at and through the said New York office of the product of the said corporation's manufactory are made by sample, and the goods sold are delivered direct from the Detroit factory. Substantially the whole business of selling such products made by Parke, Davis & Company are conducted in that manner and the great bulk of goods actually kept on hand in New
3 York are so kept simply for convenience in making distribution to purchasers.

And your petitioner claims and alleges and verily believes that the only capital in any proper sense employed by such corporation in this State in the sale of its products is the leasehold of the depot in New York and the office furniture and fixtures, all of which do not and have not during the years hereinafter mentioned exceeded in value fifteen thousand dollars.

The petitioner further alleges, on information and belief, that said corporation, being a manufacturing corporation, is exempt from taxes under the provisions of the act, chapter 542 of the Laws of 1880, and the amendments thereof.

That nevertheless the comptroller of the State of New York, against the protest of your petitioner, assumed jurisdiction to impose a tax under said chapter 542 of the Laws of 1880, and on or about June 18, 1895, he settled the account against said company for the sum of one thousand five hundred and forty dollars for six years ending November 1, 1894, fixing as the amount of its capital for each of said years the sum of one hundred thousand dollars; and as a penalty the sum of one hundred and forty dollars.

That your petitioner thereafter duly applied under and pursuant to section 19 added to said act by chapter 463 of the Laws of 1889, asking the comptroller to revise and readjust the account settled against said corporation, which application was granted and your petitioner thereupon appeared before the comptroller, protesting, however, against his jurisdiction to impose any tax, and said comptroller thereafter and on or about August 20, 1895, took the following action upon such application for revision and resettlement, namely:

4 STATE OF NEW YORK:

COMPTROLLER'S OFFICE, ALBANY, *August 20th*, 1895.

In the Matter of the Application of PARKE, DAVIS & COMPANY for a Revision of Taxes Assessed against It under Chapter 542, Laws of 1880, and the Acts Amendatory Thereof.

An application having been made by the above-named Parke, Davis & Company, for a revision and resettlement of the taxes assessed and determined against it by the comptroller of the State of New York, for the six years ending November 1, 1894, and the said comptroller having heard the proofs offered on behalf of the said Parke, Davis & Company in support of said application, and after due consideration thereof, the comptroller does hereby determine that the assessment heretofore made against the said Parke, Davis & Company for the sum of fifteen hundred and forty dollars should be reduced to the sum of thirteen hundred eighty-six dollars: which said sum of thirteen hundred eighty-six dollars is hereby determined as the amount which said Parke, Davis & Company is liable to pay under the provisions of chapter 542, Laws of 1880, and the acts amendatory thereof, for the six years ending November 1, 1894.

JAMES A. ROBERTS,
Comptroller.

5 Vol. 12, page 147.

COMPTROLLER'S OFFICE, ALBANY, N. Y.

The Parke, Davis and Company, 90–94 Maiden Lane, N. Y. C. Jno. Clay, N. Y. mgr., in account with the State of New York, Dr.

For tax on franchise or business based on value of capital stock employed in New York State, per chapter 542, Laws of 1880, as amended by chapter 361, Laws of 1881; chapter 151, Laws of 1828; chapters 359 and 501, Laws of 1885; chapter 353, Laws of 1889, and chapter 522, Laws of 1890, for the 6 years ending November 1, 1894, as per report filed.

Appraised value of capital stock.....	$90,000 00
Tax 1½ mills, see statement herewith.....	1,386 00

Revised bill.

Statement.

Vol. 12, page 147.

COMPTROLLER'S OFFICE, ALBANY, N. Y.

The Parke, Davis & Company in account with the State of New York, Dr.

To what date.	Nature of report capital stock.	Amount taken.	Rate % div.	Mills.	Amount of tax.
1892.					
Nov. 1	4 years	$90,000	10	2½	900 00
1893.					
Nov. 1	1 year	"		1½	135 00
1894.					
Nov. 1	1 year	"	10	2½	225 00
			Penalty 10%		126 00
					1,386 00

6 Your petitioner further shows and represents, that such action of the comptroller in revising and resettling said account is erroneous and illegal for the reasons hereinbefore alleged, and in that if the statute be correctly interpreted by said comptroller as not exempting said corporation from taxes thereunder then said statute is unconstitutional and void as in contravention of the Constitution of the United States and the amendments thereof, and said comptroller has also erred, even if said statute be in all respects valid and constitutional, in erroneously assuming and deciding that goods manufactured by said corporation and stored and carried at its depot in this State, are or constitute capital employed in this State within the meaning of said act, and he has erred in not holding and deciding that the only basis for lawful imposition of a tax is only the capital actually employed in this State.

That unless relief is granted by this court the comptroller will issue his warrant for the collection of the taxes imposed, and compel said company to pay the same, to its great damage and loss.

Wherefore, your petitioner prays that a writ of certiorari may be issued out of this court, directed to the comptroller of the State, commanding the comptroller to return to such certiorari the accounts and all the evidence submitted to him on the application for revision and resettlement, to the end that if the original or resettled accounts shall be found erroneous and illegal by the court, either in point of law or of fact, the same shall be corrected and resettled, and such other and further relief be granted as may be just.

JAMES McKEEN,
Att'y for Petitioner.

STATE OF NEW YORK, }
City and County of New York, } ss.:

John Clay, being duly sworn, says that he is the petitioner above named; that the foregoing petition subscribed by him is true

7 to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

(S'g'd) JOHN CLAY.

Sworn to before me this 17th day of September, 1895.

HENRY F. SMITH,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

Supreme Court, State of New York.

In the Matter of PARKE, DAVIS & COMPANY for a Writ of Certiorari.

To the comptroller of the State of New York:

Whereas, the applicant above named has duly applied to the supreme court of the State of New York for a writ of certiorari to review the action of the comptroller upon an application made to him by Parke, Davis & Company for a revision and resettlement of accounts as provided in the act, chapter 542 of the Laws of 1880 and the amendments thereof, and resettling an account against said corporation for taxes and penalty amounting to thirteen hundred and eighty-six dollars.

And whereas, the papers required by law have been duly served upon the comptroller, and said corporation has duly deposited with the State treasurer the full amount of taxes, penalties and charges so settled and adjusted by comptroller.

8 Now we, John Clay, residing at number 928 President street, in the city of Brooklyn, county of Kings and State of New York, and William B. Kaufman, residing at No. 218 West One hundred and twenty-second street, in the city of New York, county and State of New York, hereby jointly and severally undertake, pursuant to the statutes in such cases made and provided, in the sum of one thousand dollars, that if said writ of certiorari be vacated and the determination of the comptroller sustained the applicant for the writ will make payment of all costs and charges which may accrue against such applicant in the prosecution of such writ, including costs on all appeals.

JOHN CLAY.
WM. B. KAUFMAN.

STATE OF NEW YORK, }
City and County of New York, } ss.:

John Clay and William B. Kaufman, the sureties in the foregoing undertaking, being duly and severally sworn say, and each for himself says: That they are freeholders within the State of New York, and each worth the sum of two thousand dollars over all the debts and liabilities which each owes or has incurred and exclusive of property exempt by law from levy and sale under an execution.

JOHN CLAY.
WM. B. KAUFMAN.

Sworn to before me this 17th day of September, 1895.

HENRY F. SMITH,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

(Endorsed:) The within undertaking is hereby approved as to amount and sufficiency of sureties. September 17, 1895. Edgar M. Cullen, J. S. C.

9 STATE OF NEW YORK, } ss.:
City and County of New York, }

On this 17th day of September, 1895, before me personally came John Clay and Wm. B. Kaufman, both known to me, and to me known to be the individuals described in and who executed the above undertaking, and severally acknowledged that they executed the same.

HENRY F. SMITH,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

Supreme Court, State of New York.

In the Matter of the Application of PARKE, DAVIS & COMPANY for a Writ of Certiorari.

To the comptroller of the State of New York:

Please take notice that Parke, Davis & Co. having made application for a writ of certiorari by petition, filed with the clerk of the supreme court, in and for the county of Albany, on the 18th day of September, 1895, upon said petition, a copy of which is herewith served, and upon undertaking herein filed with you, and the approval of a justice of the supreme court thereof, and the receipt of the State treasurer for the full amount of taxes, penalties and charges settled and adjusted by you against Parke, Davis & Co., I will move before the supreme court, at a special term thereof,
10 to be held at the court-house, in the city of Albany, on the 12th day of October, 1895, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, that the said application be granted and writ of certiorari be issued out of this court, commanding you to certify and return at the office of the clerk of the county of Albany, all and singular, your proceedings, decisions and actions in the premises, and all and singular the accounts, evidence, documents, records and papers before you concerning said matter, to the end that said decisions and accounts may be reviewed and corrected by this court, and I shall ask that in the meantime all further proceedings be stayed.

Dated New York, September 17, 1895.

JAMES McKEEN,
Att'y for Parke, Davis & Co.,
32 Nassau Street, New York City.

At a special term of the supreme court, held at the county court-house, in the city of Albany, on the 12th day of October, 1895.

Present: Hon. D. Cady Herrick, justice.

In the Matter of the Application of PARKE, DAVIS & COMPANY for a Writ of Certiorari.

On the petition of John Clay, manager of Parke, Davis & Company, verified September 17, 1895, filed September 18, 1895, the receipt showing that the full amount adjusted against the aforenamed company has been deposited with the treasurer of the State, and upon proof of the filing with the comptroller of the undertaking required by law and proof of due service of notice of this motion, now, on motion of Mr. James McKeen—

11

It is ordered, that a writ of certiorari be issued as prayed for in said petition to James A. Roberts as comptroller of this State, returnable within twenty days after service thereof to the office of the clerk of the supreme court in and for the county of Albany.

It is further ordered, that the execution of the determination of the comptroller and all proceedings for the collection of said tax be stayed until the final determination of the matters and questions arising upon said writ, or until the further order of the court.

JAMES D. WALSH, *Clerk.*

The People of the State of New York on the relation of Parke, Davis & Company to James A. Roberts, comptroller of the State of New York:

Whereas, we have been informed by the petition of John Clay as general manager of Parke, Davis & Company, and making his petition on behalf of said company, that on or about the 20th day of August, 1895, the said James A. Roberts as comptroller of the State of New York did, as such comptroller, assume jurisdiction to settle an account against Parke, Davis & Company, thereby deciding and determining that Parke, Davis & Company, were liable to pay the sum of one thousand three hundred and eighty-six dollars ($1,386) therein specified as and for taxes due and payable.

12

And whereas, it is alleged by the said relator that your proceedings were and are without jurisdiction and contrary to law, and that unless relief is granted by this court that you will issue your warrant for the collection of the taxes so imposed and compel the relator to pay the same to petitioner's great damage and detriment; and we being willing to be certified of your proceedings in the premises as such comptroller in imposing and exacting the said tax, and in all things relating thereto do command you to certify and return at the office of the clerk of the county of Albany, within twenty days after the service of this writ upon you, all and singular your proceedings and the accounts and all the evidence submitted to you in the said matter, in order that the same may be reviewed and said accounts be corrected and restated by this court.

Witness, the Hon. D. Cady Herrick, one of the justices of the

supreme court, at the court-house, in the city of Albany, on the 12th day of October, 1895.

[SEAL.] JAMES D. WALSH, *Clerk.*

13 Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* PARKE, DAVIS & COMPANY
against
JAMES A. ROBERTS, as Comptroller of the State of New York.

To the supreme court:

The return of James A. Roberts, as comptroller of the State of New York, to the certiorari granted herein, is as follows:

First. Since the first day of January, 1894, James A. Roberts has been, and still is, comptroller of the State of New York.

Second. At the several times hereinafter mentioned the relator was and still is a corporation organized pursuant to the laws of the State of Michigan, and was doing business and employed its capital stock in the State of New York, and was and is subject to taxation under the provisions of chapter 542 of the Laws of 1880, and the several acts amendatory thereof and supplemental thereto.

Third. The said relator, having failed and neglected to report to the comptroller of the State of New York, as required by law, the comptroller did, on the 6th day of May, 1895, appoint a com-
14 missioner to examine the books, records, officers, agents and witnesses of the relator, for the purpose of ascertaining the liability of said relator to taxation, and enable him to determine the amount of taxes the said relator was liable to pay. The said commissioner, so appointed as aforesaid, examined the books and affairs of the relator, and witnesses, and made a report to the comptroller. The evidence so taken is annexed hereto and marked "Ex. A." and made a part of this return.

Fourth. From the report made to the comptroller by said commissioner and the evidence transmitted, the comptroller did, on the 18th day of June, 1895, fix and determine the amount of tax and penalties the said relator should pay to the State, under the provisions of chapter 542 of the Laws of 1880, and the several acts amendatory thereof and supplemental thereto, for the six years ending November 1, 1894, upon the capital employed and business done in the State of New York, in the sum of $1,540, and did serve upon relator notice thereof.

Fifth. The relator, after the imposition of the tax, applied to the comptroller of the State of New York for a rehearing, and the same was granted, and the same was held on the 17th day of July, 1895, before the comptroller, and the evidence taken on said rehearing is annexed hereto and marked Exhibit B and forms a part of this return.

Sixth. Thereafter the comptroller of the State of New York after considering the evidence submitted to him, upon the rehearing for

the revision and resettlement of said tax, did make a determination with reference thereto, as follows:

15 "COMPTROLLER'S OFFICE,
ALBANY, *August* 20, 1895.

In the Matter of the Application of PARKE, DAVIS & COMPANY for a Revision of Taxes Assessed against It under Chapter 542, Laws of 1880, and the Acts Amendatory Thereof.

An application having been made by the above-named Parke, Davis & Company for a revision and resettlement of the taxes assessed and determined against it by the comptroller of the State of New York for the six years ending November 1, 1894, and the said comptroller having heard the proofs offered on behalf of the said Parke, Davis & Company in support of said application, and after due consideration thereof, the comptroller does hereby determine that the assessment heretofore made against the said Parke, Davis & Company, for the sum of fifteen hundred and forty dollars, should be reduced to the sum of thirteen hundred and eighty-six dollars; which said sum of thirteen hundred and eighty-six dollars is hereby determined as the amount which said Parke, Davis & Company is liable to pay under the provisions of chapter 542, Laws of 1880, and the acts amendatory thereof, for the six years ending November 1, 1894.

JAMES A. ROBERTS,
Comptroller."

Seventh. That the relator, during the years in question, was employing a large amount of its capital within this State, and
16 was not wholly engaged in manufacture within this State, and the tax so levied against it by the comptroller was and is valid in all respects, and the relator is liable to pay the same as and for capital employed by it within this State; that the relator was engaged in the sale of goods not manufactured by it within this State, and large sales were made of large quantities of goods annually. Business was carried on in this State by the relator and it employed its capital in such manner as to render it liable to taxation in this State.

All of the acts and proceedings on the part of the comptroller were valid, and the tax should be sustained.

All of which is respectfully returned.

In witness whereof I have hereunto set my hand this 30th day of October, 1895.

JAMES A. ROBERTS,
[SEAL.] *Comptroller.*

EXHIBIT A.

In the Matter of Taxation of PARKE, DAVIS & COMPANY under Chapter 542 of the Laws of 1880 and the Subsequent Acts Amendatory Thereof.

At the State offices, rooms 84 and 85, World building, New York city, before Commissioner Charles S. Wilbur, May 24, 1895.

James McKeen, 32 Nassau street, appears specially for Parke, Davis & Company and objects to any proceedings in this matter, on the grounds: First. That Parke, Davis & Company are a
17 manufacturing corporation and are within the exceptions named in the act. Second. That if the construction of the act, which had been intimated in certain dicta by the court of appeals, be that manufacturing corporations wholly engaged in manufacturing in this State are exempt, but that manufacturing corporations in other States and only partially here, or not at all, are not exempt, then the act is plainly unconstitutional. Third. On the ground that Parke, Davis & Co., is a manufacturing corporation, organized under the laws of Michigan, and does not, in fact, exercise any corporate franchises within this State, within the meaning of the act, or in such a way as to subject them to any taxation under the act.

JOHN CLAY, being duly sworn, testified as follows:

To the COMMISSIONER:

Q. What is your connection with this company?
A. Manager of the New York branch.
Q. And this company is organized under the laws of what State?
A. State of Michigan.
Q. When?
A. I cannot answer; I can furnish that, of course.

By COUNSEL:

Q. Prior to 1888?
A. Oh, yes.

By the COMMISSIONER:

Q. Have you been their agent for that length of time—since 1888?
A. Yes, sir.
Q. What is the authorized capital?
A. $1,200,000.
Q. All issued?
A. All issued.
Q. More than one kind of stock?
A. No, sir.
18 Q. Any bonds?
A. No, sir.
Q. What is the business of the company?
A. Manufacturing chemists.
Q. Where do they manufacture?
A. In Detroit, Mich.
Q. Do they do anything but manufacture and sell their own product?
A. No, sir.
Q. They do not in any way handle the product of any other manufacturer?

A. They do not, unless in a few individual cases where agencies are established.

Q. You make these preparations?

A. In this case of anti-toxine we were prepared, but it came forward so slowly that we accepted the agency of another concern that was up to the front.

Q. Do you manufacture in New York State?

A. Very little.

Q. How many offices and places of business have you in New York State?

A. Only one.

Q. Where is that?

A. 92–94 Maiden Lane.

Q What is the business of that office?

A. To distribute to their customers, who are better served through this Eastern point.

Q. Their manufactured product?

A. Yes, sir.

Q. Do they own any real estate in this State?

A. They do not.

Q. Do they own any stocks or bonds of any corporation in this State?

A. No, sir.

Q. Are they interested in the business of any individual firm or corporation in this State?

A. They are not.

Q. What rental do they pay?

A. $12,500.

Q. What is the average amount of merchandise stock on hand?

19 A. I don't know how to answer that.

Q. Approximately?

A. Say fifty thousand dollars.

Q. Do you keep any other but your manufactured product?

A. We do; we keep crude drugs.

Q. You deal in these also?

A. We do.

Q. And these are imported here into New York?

A. They are imported into New York mostly.

Q. What is the value—the average amount of such merchandise?

A. Approximately, $50,000.

Q. That is in addition to the $50,000 of manufactured goods?

A. Yes, sir.

Q. What is the value of your personal property, outside of your merchandise stock, office furniture, fixtures, horses and wagons, personal property of any kind?

A. Office furniture and fixtures, there being no other personal property, I would place at $15,000. You can understand it is an estimate.

Q. Does the company keep a bank account?

A. It does not.

Q. Where is the bank account kept?
A. In Detroit.
Q. Do you keep an account for the company?
A. I do not keep an account for the company because my position is, in every sense, that of a commission merchant, except that instead of receiving a commission I receive a salary; therefore the bank account is kept in my own individual name.
Q. And such account, as agent of this company, averages what—monthly bank balance?
A. At the extreme, $10,000.
Q. What is the salary and pay-roll account of this office?
A. That is a matter of expenses; that is the entire expense account.
20 Q. That includes everything in the way of rentals, and so forth?
A. Everything.
Q. What does that amount to?
A. For the year 1894, about $175,000.
Q. That covers, however, your rental and all expenses?
A. Yes, sir; salaries.
Q. It goes for salaries, chiefly, I suppose?
A. Yes, sir; rentals and salaries and the running expenses of the store.
Q. Will these figures, in round numbers, that you have given me, hold good, substantially, since 1888?
A. No; they would very rapidly decline from year to year.
Q. They would decline from 1888?
A. They have been advancing from 1888. The goods are sent here for sale, consigned to me absolutely; a debit and credit account kept by me.
Q. What was the dividend made and declared for the year 1889?
A. Ten per cent.
Q. 1890?
A. Ten per cent.
Q. 1891?
A. Ten per cent.; that is the dividend of each year, except 1893, when a five per cent. dividend was paid.
Q. You say these goods are all consigned here?
A. They are.
Q. The goods manufactured by this company in Detroit?
A. Yes, sir.
Q. The imported goods, in bulk?
A. In bulk.
Q. Are they consigned goods?
A. They are bought and dealt in by myself.
Q. Then these figures that you have been given me, are the figures of your individual business, and not that of Parke, Davis & Company?
21 A. Prior to the year 1881, Parke, Davis & Co. consigned their manufactured goods to a wholesale drug concern in this city, Lane & Finck; and believing that if they consigned to

some one whose individual attention would be given them, the business could be enlarged, they instructed me to open a store here in New York, take over the consigned goods that Lane & Finck had carried and care for their interests myself, thereafter nominating me manager of the New York office; and a consignment account was opened and was so carried on their books. I am held responsible for the material sent me and for all moneys received; and as I view it, am in every way acting as a commission merchant in the matter, other than that I receive a salary, instead of a commission. I want to get this explained to you.

By COUNSEL:

Q. Do Parke, Davis & Co. buy and sell in New York, leaving out of account what has been referred to by you as crude drugs, any merchandise, other than as you sell for them, the product of their own Michigan factory?

A. They do not.

Q. Have they ever kept as a corporation, any bank account here?

A. No.

Q. The goods that are consigned to you from Detroit, are sold, some of them, by you in this market, are they not?

A. Yes, sir.

Q. And an account is kept by you with Parke, Davis & Co., at Detroit, in which you are charged with the proceeds of sales?

A. Yes, sir.

Q. And do they draw upon you?

A. They draw upon me.

Q. And the drafts drawn by them are drawn upon you, individually?

A. Upon John Clay.

22 Q. Will you state if, at the time business began, of your importing crude drugs, was there any conversation between you and the officers of Parke, Davis & Co., as to your importing crude drugs here, in reference to the relations of the corporation to that business?

A. I had lived abroad for a good many years, prior to taking matters in hand here and had a very broad familiarity with foreign markets. I found that they were using very largely and increasingly, crude drugs imported from foreign countries, and knowing that from my close acquaintance there, facilities would be given, I asked consent to enter into the importation of these crude drugs from abroad, not only for their own use, but in excess of their use and for the purpose of offering them in original packages to the open market. They replied that the capital of the concern was entirely needed for the conduct of their manufacturing business; that I might do as I wished, if I would not call upon them for a dollar of investment; so as all this material was sold from abroad on long time, I commenced to order in excess of their wants, and by turning over these cases on our shorter terms of sale in this country, found that a fund was accumulating that I kept investing in that form, and they never had put one cent of their capital in it.

By the COMMISSIONER:

Q. But they own it, however?
A. Certainly.
Q. The profits of that part of the business go to them?
A. Yes, sir.

By COUNSEL:

Q. But the title is all in you; the goods are imported altogether by you?
A. Altogether; the title is in me.
Q. And you account to them for the sale of these crude drugs?
23 A. I account to them for the profits of this business, but no capital was ever invested.
Q. Are the goods that are imported by you and also the goods that are consigned to you from abroad, which are sold here, sold in the original packages?
A. With very few exceptions.

By COMMISSIONER:

Q. Do they come addressed to you?
A. Yes, sir; John Clay.

By COUNSEL:

Q. Was this method of doing business that you have described resorted to or adopted with any view whatever to any liability to tax?
A. No, sir; we were not conscious of such liability.
Q. You do, I believe, incidentally, in the crude-drug department, occasionally make purchases in this market?
A. We do.
Q. But the great bulk of both these purchases and of the imported crude drugs which are imported by you—purchased by you—are sent by you to Michigan, to be there worked up into manufactured products?
A. Yes, sir.
Q. But you do in some instances and incidentally sometimes make sales in this market of crude drugs that have been purchased here?
A. We do.
Q. Will you please state the amount of goods, crude drugs, that you purchase here and that you sell here, excluding the merchandise that you ship to Detroit?
A. The amount of goods in New York State, for resale and re-sold—

1889	$32,416 87	1890	$23,670 51
1891	37,269 62	1892	40,915 78
1893	62,752 28	1894	34,234 06

24 Q. Do these figures that you have last given represent the total amount of property that, in any sense of the word,

whether we hold that you are acting individually, or in the sense as agent of Parke, Davis & Co., the total amount that you turn over in this market?

A. Yes, sir.

Q. Is it true that all the rest of the transactions are wholly either purchases here made simply for manufacturing purposes in Detroit, or importations made and disposed of in the original package, or sales made of goods consigned from Detroit to you?

A. Yes, sir.

Q. Have Parke, Davis & Co. ever held any corporate meeting of any kind in New York?

A. Never.

Q. You were asked some questions as to the character of their business; won't you describe more fully what the entire business is, as carried on by Parke, Davis & Co.? You said they were manufacturing chemists; won't you kindly describe a little the general character of the way the factory is conducted, as to working up raw material?

A. We would be more strictly described as manufacturing pharmaceutical chemists, which means that crude material is taken and by certain processes brought into a more convenient form for administration as medicine; so fluid extracts are made from bark, or roots or seeds, and solid extracts are made from the same. Certain alkaloids are extracted from the crude material; pills are thus made.

Q. I understand you to say that you do not do any jobbing business whatever, in Detroit?

A. No, sir.

Q. The business is entirely confined to the conduct of the factory and the sale of the products of their own factory?

A. Absolutely.

Q. Are the goods that are sent to you from Detroit for sale here sold here by you in the original packages?

25 A. Yes, sir.

Q. Entirely so?

A. Pretty nearly.

Q. And the exceptions are merely trivial?

A. Merely trivial.

Q. Is the account kept between you and Parke, Davis & Co. a debit and credit account?

A. A debit and credit account.

Q. I believe the lease of the store is in the name of Parke, Davis & Co., or is it in your name?

A. I cannot definitely answer; I find I have not a copy of the lease in my safe.

Q. You pay the full rental for the premises—all they are worth?

A. Yes, sir.

Q. The lease has no value?

A. In my estimation, no.

Q. Do these office fixtures belong to Parke, Davis & Co.?

A. They do.

Q. Unless it be the office fixtures and the leasehold, do Parke, Davis & Co. own any property in the State, as far as you know?
A. Not that I am aware of.
Q. Other than the goods consigned?
A. Other than I have described in my testimony.

(Witness submitted the following figures:)

Sales. City. 1890, $259,925.85. 1891, $316,561.84. 1892, $330,860.38. 1893, $355,402.62. 1894, $358,417.97.
Country. $225,089.74. $248,076.01. $278,190.23. $263,892.03. $294,004.01.
Total. $482,915.57. $564,637.85. $607,050.61. $619,094.85. $652,421.98.

City account (same years).

Annual net expenses. $86,810.79. $110,608.73. $133,785.03. $131,625.51. $147,171.99.
Inventory. $79,288.67. $76,841.84. $101,155.78. $91,629.77. $108,478.04.

26 Crude drug (1889 to 1894, inclusive).

Annual sales of which to Parke, Davis & Co., Detroit. $200,568.78. $242,227.18. $252,677.45. $320,896.34. $295,332.22. $345,667.55.
$50,771.14. $72,428.74. $67,485.98. $85,558.74. $59,151.79. $145,179.11.
Resold. $149,797.64. $169,798.44. $185,191.47. $235,337.60. $236,180.43. $202,488.44.
Expenses. $18,147.20. $17,635.40. $21,540.35. $19,295.24. $24,273.40. $24,680.98.
Inventory. $78,254.88. $64,635.82. $41,737.52. $46,201.66. $53,296.28. $60,302.85.

EXHIBIT B.

STATE OF NEW YORK, }
Comptroller's Office. }

In the Matter of the Application of PARKE, DAVIS & COMPANY for a Revision and Readjustment of the Taxes Assessed against It by the Comptroller.

Rehearing held at the State comptroller's office, Albany, N. Y., July 17, 1895, before Hon. William J. Morgan, deputy comptroller.

Mr. James McKeen appeared for the company.

Mr. MCKEEN: I object on behalf of Parke, Davis & Company that there is no jurisdiction to impose a tax under the act,
27 and that the tax, as fixed and adjusted heretofore, is erroneous, on the ground that—

First. That the Parke, Davis & Company are a manufacturing corporation, and are within the exceptions named in the act; and,

Second. That if the act be construed as imposing a liability on the ground that this corporation is not wholly engaged in manufacturing in the State of New York, it is clearly unconstitutional as a discriminating tax.

Third. On the ground that Parke, Davis & Company had not exercised any corporate franchises in this State within the meaning of the act; and the comptroller is asked upon this rehearing that should he overrule the objections to the extent of holding that there is a liability, that the account against the corporation should be readjusted, and in case he should hold that, so far as any capital is employed in this State in the conduct of the business, the only capital so employed that can be made the measure of any tax under the act is the capital continuously employed, and he has erred in assuming that the stock of goods carried here is capital in the State.

JOHN CLAY, being duly sworn, testified as follows:

Examined by Mr. MCKEEN:

Q. Mr. Clay, will you please state what relation you sustain, if any, to Parke, Davis & Co.?

A. I am manager of the New York office.

DEPUTY CONTROLLER:

Q. Member of the firm?

A. It is a corporation.

Mr. MCKEEN:

Q. Where is your factory located?

A. In the State of Michigan.

Q. And what is the business for which it is incorporated?

28 A. Manufacturing pharmacists—manufacturing chemists.

Q. Where is the bulk of its business carried on?

A. Detroit, Michigan.

Q. Will you please describe briefly how that business is conducted at Detroit by the company, what it does—actually does?

A. We prepare certain chemical compounds and pharmacists' preparations by taking the crude material and by various processes bringing it into a more concentrated form for convenience for using for medicine, such as food extracts and solid extracts, and compounds of that character.

Q. What business, so far as the products of the factory are concerned, is conducted in New York by you—I refer to the manufactures at Detroit?

A. You mean how is it conducted?

Q. Yes; what you do in New York?

A. I am there practically as an agent. They consign to me there the manufactured products of our laboratory in form for delivery to the trade, and for convenience a stock is carried there for ready

circulation—orders received, packed and shipped to various parties; is that what you want?

Q. Yes. Do you do in New York any jobbing business of any description in the matter of manufactured articles of other parties?

A. Practically none.

Q. Will you state how the business was conducted prior to the present arrangement under which you act as manager in New York—how did Parke, Davis & Co. perform it?

A. Prior to the opening of our store they were consigned to a wholesale drug concern in New York city named Finck and by them sold on commission.

Q. And what led to the change that was made? To what extent was the change made?

A. The change was made for the reason that they being general dealers, could not give as careful attention to any one particular line of merchandise that it would receive with proper care,
29 thereby keeping the business, so far as they are concerned, dwarfed. The commission agency was taken from this firm of Lane & Finck, and this depot opened up, and I was appointed there as their agent that there might be definite attention given entirely to the matter.

Q. Are those goods sent to you by the firm at Detroit?

A. Yes, sir.

Q. And in the matter of making sales, how is it as to the course of the business in making sales and accounting for sales in New York?

A. It is divided into two sections, that is to say, the country trade and the city trade. The city trade covers certain territory merely surrounding New York, and the customers in that section have their accounts carried upon my ledger there in New York. For the country trade the orders come to me there as their agent and are by me shipped to them; the invoices are sent to Detroit and charged on their books and the accounts are collected by them.

Q. And is a debit and credit account kept between you individually and Parke Davis & Co.?

A. Yes, sir.

Q. And they draw on you for the proceeds or you remit to them the proceeds, and account to them for the proceeds of all sales?

A. Yes, sir.

Q. Is that done precisely as in the case of any ordinary consignment account, with the exception that you are paid a salary, instead of a commission?

A. With the exception that I am paid a salary instead of a commission.

Q. And it has appeared that you, in connection with the business as you have described it, carry on, to some extent, what you have described as crude-drug department. Will you please state how that business originated, and what the general character of that business is?

A. Prior to entering the service of the Parke Davis Company I

lived abroad for a great many years and had a thorough fa-
30 miliarity with the markets of foreign countries, and it oc-
curred to me that by using such information I might be able to add to the business an importing business by bringing over these crude drugs in excess of what would be required for the use of our laboratory and selling the rest in the general market, thus making a large buyer of those goods. I applied to the concern for their consent, and they said I might do as I wished in that direction, but that they would not invest a dollar of capital.

Q. That company has never invested any capital in that business?

A. Never. They never put in one dollar into what we term the crude-drug department.

Q. And are all these importations in crude drugs made by you individually?

A. Yes, sir; to John Clay.

Q. And the title is, of course, in you?

A. The title remains in me.

Q. Did Parke, Davis & Co. ever keep any bank account in New York?

A. Never have and don't.

Q. Was any arrangement—was anything done in the nature of the arrangement of this business with any idea of evading in any way, any liability to taxation?

A. No, sir.

Q. Now, you have stated that you estimate for the years since 1890, on an average, that you carry of goods made by Parke, Davis & Company, at the New York office, about $50,000. Will you state how, and in what way, and for what reasons the stock of goods is carried in New York?

A. For convenience in delivery—to save time to our customers.

Q. In other words, state whether the entire sales that are made at the New York office would be made substantially the way that they are now made without carrying any stock there?

31 A. A large proportion of the business would be done in that form.

Q. That is the business would go on just as it now goes on, by making sales of merchandise in New York, and having shipments from the factory at Detroit?

A. Already, it is largely done in that way, outside of the stock we carry.

Q. You also stated that on any average during the same years, you have generally had in New York of crude drugs that you have imported an average stock of about $50,000. Will you state what the course of business is in connection with the importation of crude drugs? Are they imported and sold in the original packages?

A. They are imported and sold in the original packages.

Q. Is the same thing true of the sales made of shipments made from Detroit?

A. Yes, sir.

Q. State whether or not, a very large portion of the crude drugs

imported by you are shipped directly to Detroit for consumption in the factory there?

A. It is true.

Q. I believe it has appeared in connection with the carrying on by you of this importation of crude drugs, that you did make some purchases of raw material in New York?

A. It is true.

Q. That is the company, isn't it?

A. Yes, sir.

Q. Have you examined the books so that y are able to state for the series of years since 1890 what amount of capital is used by you in the State of New York in that business? That is, the amount of continuing capital that has been used in these years?

A. Yes.

Q. Will you give those figures?

32 A. I have a table prepared by the book-keepor; that is what you want, I suppose?

1889	$32,416 87
1890	23,670 51
1891	37,269 62
1892	40,915 78
1893	62,752 28
1894	34,234 06

DDPUTY COMPTROLLER: This is the amount of money that is invested in this foreign drug business? That is the amount of money that has been used in the conduct of that business in the State of New York in the purchase and sales—the investment in the State of New York business?

A. Not applied to that whatever.

Mr. MCKEEN:

Q. As a matter of fact, will you state as to the conduct of this importing business by you—the whole of it—as to how it happens that it doesn't involve any actual use of capital—the importing business?

A. From the fact that in purchasing those lines abroad, the credits are long—in selling in this country, the credits are short. By that means it develops its own capital after investment.

Q. The goods are handled on credit?

A. Principally.

Q. Now, in making the sales of the products of the Detroit factory in New York, is any capital employed in the State beyond the office and furniture?

A. No, sir.

Q. Does the corporation—Parke, Davis & Co.—own any real estate in New York State?

A. None.

Q. They pay rental, I suppose, on the city warehouse?

33 A. They do.

Q. Is that a rental from year to year?

A. It is a lease.
Q. Has the lease any value as a leasehold?
A. Not that I am conscious of.
Q. You couldn't sell it so as to get any higher rent from a tenant?
A. I don't think I could.
Q. Do you own any wagons—that is, the corporation?
A. It doesn't.
Q. What is the value at the outside of the property that they own, that they use in carrying on the business? I refer to the desks, and safes and furniture.
A. Well, I estimate again roughly at $15,000—the furniture, desks, &c.
Q. That, in your judgment, is an outside figure of all the property that is employed in the State of New York in the conduct of the business?
A. That is for conducting the offices and building.

DEP. COMPTROLLER:

Q. You said you were the general manager of the Park Davis Company's business in New York?
A. Yes, sir.
Q. Their store is located where?
A. 90, 92 and 94 Maiden Lane.
Q. Have you a warehouse in addition to the storehouse?
A. No.
Q. And your business is done in the store in Maiden Lane?
A. Yes, sir.
Q. How much of a store is it?
A. 74 ft. front by, I think, 90; something like that.
Q. How much rent do you pay?
A. $12,500 a year.
Q. How much of a force have you?
A. Fifty-odd, I think.
Q. Fifty-odd people?
34 A. Yes, I think so.
Q. Are you under salary?
A. Yes, sir.
Q. What is your salary?
A. $8,000.
Q. A year?
A. Yes, sir.
Q. What does your pay-roll amount to outside of this, or including yourself?
A. I think I have a memorandum here. Well, it is in the shape of expenses, including the rent, salaries, &c.
Q. That will do. State what is included, and then give the total amount.
A. The entire expenses of conducting the branch.
Q. That includes your salary?
A. Yes, sir. What do you want, an average as nearly as possible of this series of years.

Q. Average the whole period, or else give it for the individual year.

A. Let me answer your question in this form then. The total amount of expenses was not far from in

1890	$102,000
1891	128,000
1892	155,000
1893	151,000
1894	172,000

Q. Now, then, state in detail as to what you mean by total expenses.

A. Salaries of employees, rentals, insurance, my salary, repairs, &c.

Q. You speak of having a city and a country trade. Do you have traveling agents in the country, throughout the State, where you sell outside of the city of New York?

A. Yes, sir.

Q. How many agents have you?

A. I think the last report was 100 or 104 men.

Q. Are they on the road?

35 A. On the road.

Q. Are they included in this pay-roll?

A. They have no connection with this department even, unless a few of them. I don't believe that their expenses would appear under this caption. I believe it would not.

Q. Where are the others paid from?

A. Detroit; from headquarters.

Q. Employed directly from the headquarters of the concern?

A. All of them are employed——

Q. Traveling in this State selling those goods?

A. All are employed from the Detroit office.

Q. Those goods are delivered where they sell them?

A. Yes, sir; partly from the New York office and partly from the home office.

Q. You stated that you carry a stock of goods in New York at your Maiden Lane store, on an average of $50,000, does that mean on an average for this term of years?

A. Yes, sir.

Q. Have you any goods on sale elsewhere throughout the State?

A. No.

Q. Then all the goods that belong to Parke, Davis & Co. are held by you in New York?

A. That is right.

Q. State in detail the method of doing that business. They ship to you as their agent, consign the goods to you?

A. Yes, sir.

Q. You receive the goods in the store at New York, and have them on sale there?

A. Yes, sir.

Q. And when you deliver them as the agent of Parke, Davis & Co.?

A. That is right.

Mr. MERRILL: Do you hold any financial securities in any other corporation here in this State?

A. No, sir.

36 Q. About your bank balance—whose bank balance is this?

A. John Clay.

Q. Whose money is it?

A. Parke, Davis & Co.

Q. What is the amount of it on the average?

A. About $10,000.

DEPUTY COMPTROLLER:

Q. For this period of years?

A. I should judge so.

Q. That is your best judgment?

A. Yes, sir; not beyond that.

Q. In regard to this crude-drug business, that is conducted in whose name?

A. Parke, Davis & Co., so far as sales are concerned.

Q. As regards the importation?

A. John Clay.

Q. John Clay is the buyer abroad?

A. John Clay is the buyer abroad and receives the goods. John Clay is drawn upon from abroad to pay for them; they are insured in the name of John Clay.

Q. And who receives the profits from the business?

A. Ultimately, what remains, goes to Parke, Davis & Co.

Q. The fact then, of doing the business in the name of John Clay, is simply a convenience?

A. The facts are as I gave them to you. It grew up in that form.

Q. How much of a business of that crude-drug line did you do during the years in question?

A. Over and above what was sent to the laboratory at Detroit, for their use, our sales in the open market for that period, were as follows:

1890	$169,798
1891	185,191
1892	235,937
1893	236,180
1894	202,488

37 Q. These sales are made in the open market, and regardless of what you send to the laboratory in Detroit?

A. Yes, sir.

Q. How much have you sent on the average to the laboratory in Detroit?

1890	$72,428
1891	67,485
1892	85,558
1893	59,151
1894	143,179

Q. These goods are bought by you on account of Parke, Davis & Co., and received in New York, and shipped directly to Detroit for use there?

A. These goods are bought by me in the same way that all other goods are bought abroad; and I fill their orders for crude drugs the same as I would for any other concern in the country, charging them the same price as any stranger.

Q. And the profits that accrue from the business that is done with other people in this crude-drug line finally goes to Parke, Davis & Co.?

A. Ultimately, as soon as I am released from responsibility.

Q. Do you have any stores separate from the one you have described, for this business?

A. We don't.

Q. It is done in the same store with the Parke, Davis & Co.'s business?

A. Yes, sir.

Mr. MERRILL:

Q. Mr. Clay, what proportion of these crude drugs have you purchased in the open market in the State of New York?

A. I think I have given that testimony before.

Q. What portion of these drugs of the whole lot?

A. It is the same figures that you have already.

1890	$23,676 51
1891	37,269 62
1892	40,915 78
1893	62,752 28
1894	34,231 06

38 Q. How often do you turn these drugs over, that is, the money that is invested in them?

A. I can't tell you.

Q. Approximately?

A. I can't answer the question. It is impossible for me to do it.

Q. Do you turn them over once a month?

A. No. They represent the entire purchases made in New York State during the entire year.

DEPUTY COMPTROLLER:

Q. Mr. Clay, you stated those figures are the same as you gave already; what figures are those? What do you mean?

A. It had reference to the amount of business we had done in the State.

Q. What business were you talking about then? You stated there that these were the importations.

A. No, sir; it doesn't refer to that.

Q. Those are goods that you buy in the New York market?

A. Yes, sir; for resale.

Q. Those goods that you import, do you sell them? First of all, how do they come to you?

A. Bales, boxes and barrels.

Q. Then you take them out of these bales and boxes and put them on the shelves?

A. You are speaking of the importing?

Q. Yes.

A. No, we sell in the original packages.

Q. In the bales?

A. Yes, sir.

Q. And in the boxes?

A. Yes, sir.

Q. Without breaking at all?

A. Yes, sir.

Q. Just as it comes from the ship?

A. Yes, sir; with exceedingly few exceptions.

Mr. MERRILL:

Q. Can you give us an answer to that question? Do you turn it over once a year (referring to a previous question by Mr. Merrill)?

A. I suppose I do; but I confess to you I don't know how to answer the question.

39 Mr. MCKEEN: Mr. Clay, you have been asked about the imported drugs, and have stated, with very few exceptions, they are sold in the original packages. To what extent in value do these exceptions go? How trifling is that?

A. Oh, it is infinitesimal.

Q. Now, you have been asked to state the expenses of conducting this business, and have given figures which represent the expense of this New York office. Do these expenses cover the conduct of the business in this general section of the country, irrespective of the city of New York?

A. Yes, sir.

Q. And it is a fact, isn't it, that what you have designated as the New York branch of Parke, Davis & Co. is carried on by you over a large tract of Eastern territory, including a great number of cities other than New York?

A. Yes, sir.

Q. And it is true, isn't it, that the sales you have given of drugs imported in the original packages includes sales made in a great many Eastern cities outside of New York?

A. It includes every city in the Union, and also goods that we export.

Q. Now, other than the figures that you have given as representing purchases made of drugs in this market and resold here, are

any of the proceeds of the sales made by you reinvested here for further and other business?

A. No.

Q. Is it or is it not, a fact that all other proceeds than those you have given as representing purchases made here, are remitted or accounted for by you to the Detroit headquarters of the corporation?

A. After paying current expenses—working expenses—it is a fact.

Mr. MERRILL:

Q. Mr. Clay, you made some dividends along during this period; will you please state what the dividends were for those years.

A. Semi-annual 5 per cent. dividends.

Q. Then for each of those years 10 per cent. dividend, except one year?

A. Yes, sir; then it was five. I think it was in 1893, the year of the depression.

DEPUTY COMPTROLLER:

Q. How much is the company capitalized at?

A. It is capitalized at $2,000,000—$1,200,000 we paid in—$1,200,000 issued. The authorized capitalization is $2,000,000.

Mr. MCKEEN:

Q. At the time you engaged in this crude-drug business that you have described, was it or not a subject of consideration with the corporation as to their entering upon that as a corporation?

A. There was.

Q. What was the decision about it?

A. That I must undertake it, if at all, without calling upon them for a dollar's worth of aid.

Q. Is their corporate charter exclusively for the manufacture and sale?

A. Exclusively for the manufacture and sale.

DEPUTY COMPTROLLER:

Q. Manufacturing and sale; by that you mean the sale of the manufactured product?

A. I answered the question according to the wording of our charter. The charter reads: "For the manufacture and sale of," &c., &c.

41 Supreme Court, General Term, Third Department.

Mayham, P. J., Putnam and Herrick, JJ.

ALBANY, *December*, 1895.

PEOPLE *ex Rel.* PARKE, DAVIS & COMPANY
against
JAMES A. ROBERTS, Comptroller.

James McKeen, for relator.

T. E. Hancock, attorney general (C. D. B. Hasbrouck, deputy attorney general, of counsel), for respondent.

HERRICK, *J.*:

This is a proceeding to review by certiorari the decision of the comptroller of the State in assessing and levying a corporation tax upon the relator.

The relator is incorporated for manufacturing purposes under the laws of the State of Michigan, and is engaged in the business of manufacturing preparations for pharmacists and chemists. Such manufacture consists in the preparation of chemical compounds and pharmacists' preparations, by taking the crude materials and by various processes producing them in a concentrated form, convenient for using for medicines, such as fruit extracts and solid extracts. The factory is situated in the city of Detroit, Michigan.

Prior to the years for which the relator has been taxed by
42 the comptroller, the relator shipped its products in unbroken packages to a wholesale drug concern in the city of New York, which sold the same upon commission. The house to which it consigned its goods did not give its exclusive attention to the sale of relator's merchandise, but was a general dealer. For the purpose of having exclusive attention given to its line of goods, the relator changed its method of doing business, and selected a person named Clay to whom it consigned its products. There is a debit and credit account between them of the goods received by him, and of the amount sold. He remits the amount of sales made, and receives from it a stated salary; he is not paid by commission; a stock of its products is always kept on hand by him; stores are leased and clerks employed at its expense. Such expense ranged from $102,000 in the year 1890 to $172,000 in the year 1894, which includes salaries of employees, rentals, insurances and repairs.

The orders received in New York city and its immediate vicinity are supplied from this store, or headquarters in New York city. Orders received in what is known as the country districts, that is in places at considerable distance from New York city, are filled by transmitting such orders to the home establishment at Detroit, Michigan, and the goods are shipped direct from the factory there to the persons ordering them.

The stock carried in the store in New York city is of the average amount of $50,000. Mr. Clay also purchases crude drugs in Europe, which he imports to this country, through the port of New York. A portion of such importations are sent to the home establishment

at Detroit, and another portion is sold from the New York store. Purchases of crude drugs are also made by him in New York; some are shipped to Detroit, and some sold in New York city.

These goods are purchased upon the credit of the relator; it invests no cash in their purchase.

43 It is contended by the relator that Mr. Clay is not its agent, that he is carrying on an independent business in its drugs, and stands in the same relation to it as any merchant in such city, purchasing its drugs, or of a commission merchant to whom it should consign goods to be sold upon commission, and that therefore it should not be taxed as a corporation doing business in this State.

Without entering into any discussion as to what constitutes the relation of principal and agent, it seems to me very clear that Mr. Clay is in fact the agent of the relator. The rent of the establishment from which its drugs are sold in New York city is paid by it; it pays the insurance, taxes and repairs; it pays the salaries of the various employees engaged in conducting the business there.

It keeps a stock of its goods to a large amount at the store in New York city. Charging the goods to him, and keeping a debit and credit account between itself and Clay, is simply a convenient way of keeping an account of its transactions with its New York city branch. That is its distributing agency in the State of New York.

The goods that are purchased by Mr. Clay in Europe are purchased upon its credit. The entire proceeds of the sales in New York city are transmitted by Clay to the relator; he is paid a stated compensation, which is not dependent upon, or measured by, the amount of the sales or of the profits. He appears to be simply its representative, managing and conducting its business in the city of New York for and on its behalf.

But relator further contends that assuming that Clay is its agent, that it is carrying on a manufacturing business, that the sale of its products are a necessary incident to the manufacturing business, and that if it was incorporated under the laws of the State of New York, and doing business here, it would at least to the extent of the products of its own manufacture, be exempt from taxation within the case of The People *ex rel.* Tiffany & Co. *vs.* Campbell, 144

44 N. Y., 166, and at most only be taxable upon the business that it transacts in goods other than those manufactured by itself; and it claims that under article 4, section 2, of the Constitution of the United States, providing that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," it should be permitted to do business upon the same footing as domestic corporations wholly engaged in manufacturing, and if taxed at all, should only be taxed upon that business which is carried on by it outside of its corporate powers, as was done in the Tiffany case.

We do not think that this last contention can prevail.

The right of citizens to associate themselves together and do business as a corporation, is not a natural or inherent right, but is a special privilege, granted by the sovereign power; and a privilege

so granted cannot be exercised in a sovereignty other than that granting it, except by comity; to hold otherwise, would extend the power of such sovereignty beyond its territory, and give to its laws ex-territorial force and effect.

Again, corporations are not citizens within the meaning of that clause of the Constitution relied upon. "The privileges and immunities secured to citizens of each State in the several States by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their constitution and laws, by virtue of their being citizens. Special privileges enjoyed by citizens in their own States are not secured in other States by this provision. It was not intended by the provision to give the laws of one State any operation in other States. They can have no such operation, except by the permission, expressed or implied, of those States. The special privileges which they confer must, therefore, be enjoyed at home, unless the assent of other States to their enjoyment therein be given."

Paul *vs.* Virginia, 75 U. S., 168.
People *vs.* Imlay, 20 Barb., 68-80.

45 The right of the State to exclude foreign corporations has been repeatedly adjudicated upon, and is well settled.
People *vs.* Fire Association, 92 N. Y., 311.

The right of a corporation, incorporated in a foreign State, to do business in this State, being dependent upon the assent of this State, it may impose such reasonable terms and conditions upon such assent as it deems proper. It is unnecessary to cite authorities to show that a tax upon that privilege of doing business here, measured by the amount of its capital stock employed in such business, within this State, is one entirely within its power. Establishing a place for the sale of its goods within this State, paying rent therefor, hiring and employing agents and employees to conduct such business, selling its products from such place, is transacting business within this State, seems to me can admit of no question. That a business so conducted and carried on is not interstate commerce, which will prevent the corporation carrying it on from being taxed, has been held in the case of The People *ex rel.* S. C. O. Co. *vs.* Wemple, 131 N. Y., 64.

The writ of certiorari should therefore be quashed, and the decision of the comptroller affirmed, with fifty dollars costs and disbursements.

I concur.
S. L. H.
I concur.
J. R. P.

46 At a general term of the supreme court of the State of New York, held in and for the third judicial district, at the city hall in the city of Albany, N. Y., the 28th day of December, 1895.

Present: Hon. Stephen L. Mayham, P. J.; Hon. John R. Putnam, Hon. D. Cady Herrick, associate justices.

PEOPLE OF THE STATE OF NEW YORK *ex Rel.* PARKE, DAVIS & COMPANY, Relator,
vs.
JAMES A. ROBERTS, as Comptroller of the State of New York, Respondent.

This cause having been heard at the term of this court commencing December 3, 1895, upon the writ of certiorari herein, and upon the return of the defendant hereto, and after hearing James McKeen, of counsel for the relator, and Hon. G. D. B. Hasbrouck, deputy attorney general, of counsel for the defendant,

Ordered, that the proceedings of the defendant as comptroller of the State of New York, in assessing and imposing a tax upon the relator and settling an account therefor for the six years ending November 1, 1894, at the sum of $1,540, as specified and set forth in said writ of certiorari, be and the same hereby are in all respects confirmed, with $50 costs, and $7.69 disbursements; in all, $57.69.

J. M. BOTHWICK, *Clerk.*

47 Supreme Court, General Term, Third Department.

PEOPLE *ex Rel.* PARKE DAVIS & COMPANY, Relator,
vs.
JAMES A. ROBERTS, as Comptroller of the State of New York, Respondent.

Please take notice that Parke Davis & Company, the relator above named, hereby appeal to the court of appeals of the State of New York from the order and determination of the general term of the supreme court of the third judicial department, made in the above-entitled proceeding on the 28th day of December, 1895, which said order confirms the determination of the comptroller in imposing and assessing a tax on the relator, and settling an account thereon or or about the 20th day of August, 1895, for the sum $1,386, as specified and set forth in the writ of certiorari herein, and that the defendant recover of the relator $57.69 costs; and from each and every part of the order and determination herein.

Dated this 26th day of January, 1896.

JAMES McKEEN,
Att'y for Relator, 32 *Nassau St., N. Y. City.*

To Hon. T. E. Hancock, attorney general, Albany, N. Y.
To James D. Walsh, county clerk, Albany, N. Y.

48 PEOPLE *ex Rel.* PARKE DAVIS AND COMPANY, Relator,
vs.
JAMES A. ROBERTS, as Comptroller, &c., Respondent.

It is hereby stipulated that the foregoing are true copies of the order appealed from, of the original papers, and the whole thereof

which were used in the court below, and of the notice of appeal therefrom.

Certification by the clerk is hereby expressly waived.

Dated January 29, 1896.

T. E. HANCOCK,
Attorney General.
JAMES McKEEN,
Att'y for Relator.

STATE OF NEW YORK,
City and County of Albany, Clerk's Office, } ss.:

I, James M. Borthwick, clerk of the said city and county, and also clerk of the supreme and county courts, being courts of record held therein, do hereby certify that I have compared the annexed copy papers on certiorari on appeal, etc., with the original thereof, filed in this office on the 27 day of June, 1896, and that the same is a correct transcript therefrom and of the whole of said original.

In testimony whereof I have hereunto set
Seal Albany County, July, 1847. my hand and affixed my official seal this 12 day of August, 1896.

J. M. BORTHWICK, *Clerk.*

49 At a special term of the supreme court of the State of New York, held at the court-house, in the city of Albany, N. Y., on the 27th day of June, 1896.

Present: Hon. Alden Chester, justice.

Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* PARKE DAVIS & COMPANY
against
JAMES A. ROBERTS, as Comptroller of the State of New York.

On reading and filing the remittitur of the court of appeals in the above-entitled action, and on motion of T. E. Hancock, attorney general of the State of New York, of counsel for the comptroller—

It is ordered that the judgment and order of the court of appeals in all things affirming the order of the general term of the supreme court, with costs, be, and the same is hereby, made the judgment and order of this court.

Enter.

ALDEN CHESTER, *J. S. C.*

STATE OF NEW YORK,
City and County of Albany, Clerk's Office. } ss.:

I, James M. Borthwick, clerk of the said city and county, and also clerk of the supreme and county courts, being courts of record held therein, do hereby certify that I have compared the annexed copy order on remittitur with the original thereof, filed in this office on

the 27 day of June, 1896, and that the same is a correct transcript therefrom and of the whole of said original.

In testimony whereof I have hereunto set
Seal Albany County, July, 1847. my hand and affixed my official seal this 12 day of August, 1896.

J. M. BORTHWICK, *Clerk.*

50 [Endorsed:] People *ex rel.* Parke Davis & Co. ag'st James A. Roberts, as comptroller, &c. Order making judgment of court of appeals the judgment of this court.

51 Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* PARKE DAVIS & COMPANY *against* JAMES A. ROBERTS, as Comptroller of the State of New York. } Judgment.

A writ of certiorari having been heretofore issued herein to review the action and proceedings of the comptroller of the State of New York in assessing a tax against the relator, and the proceedings having been heard upon the petition, writ of certiorari and return, at a general term of this court, held at the city of Albany, on the — day of December, 1895, and the general term having in all things affirmed the proceedings of the comptroller, and an appeal having been taken by the relator to the court of appeals and due deliberation having been had thereon, and the court of appeals having in all things affirmed the order of the general term of the court with costs, and the records of the court of appeals having been transmitted to the supreme court and made the judgment an order of the supreme court, and the costs having been taxed at the sum of fifty-seven & $\frac{69}{100}$ dollars—

Now, on motion of Theodore E. Hancock, attorney general, of counsel for comptroller of the State of New York,

It is ordered and adjudged that the order & judgment of the general term in this proceedings in all things affirming the determination of the comptroller, in assessing a tax against the relator for the years 1889, 1890, 1891, 1892, 1893, & 1894, at the sum of thirteen hundred & eight-six dollars, be, and the same is hereby, in all things affirmed, and that the comptroller of the State of
52 New York recover of the relator the sum of one hundred & $\frac{33}{100}$ dollars, costs and disbursements as taxed, and have execution therefor.

J. M. BORTHWICK, *Clerk.*

STATE OF NEW YORK,
City and County of Albany, Clerk's Office, } *ss:*

I, James M. Borthwick, clerk of the said city and county and also clerk of the supreme and county courts, being courts of record held therein, do hereby certify that I have compared the annexed

copy — judgment with the original thereof, filed in this office on the 27 day of June, 1896, and that the same is a correct transcript therefrom and of the whole of said original.

Seal Albany County, July, 1847.

In testimony whereof I have hereunto set my hand and affixed my official seal this 12 day of August, 1896.

J. M. BORTHWICK, *Clerk.*

53 [Endorsed:] B. 64, p. 48. D. K. People *ex rel.* Parke Davis Company *vs.* James A. Roberts, as comptroller. Judgment. June 27th, 1896, 11.55 a. m.

54 Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* PARKE DAVIS & COMPANY, Plaintiffs,
against
JAMES A. ROBERTS, as Comptroller of the State of New York, Defendants.

To the Honorable Rufus W. Peckham, Justice of the Supreme Court of the United States:

And now comes Parke Davis & Company, by James McKeen, its attorney, and complains that in the record and proceedings and also in the rendition of the judgment of a plea in the suit between The People of the State of New York *ex rel.* Parke Davis & Company, plaintiffs, and James A. Roberts, as comptroller of the State of New York, defendant, which is in the supreme court of the State of New York on a remittitur from the court of appeals of the State of New York, being the highest court of law and equity of the said State in which a decision in said suit could be had, remitting to the said supreme court of the State of New York the record in the said suit, with an order affirming the said judgment theretofore rendered in the said supreme court on the thirteenth day of January, 1896, in favor of the defendants and against the plaintiff, adjudging
55 that the decision of the comptroller in assessing a tax of $1,386 for the six years ending November first, 1894, should in all respects be confirmed and the writ of certiorari herein be dismissed and quashed, with $50 disbursements & costs; upon which direction a final judgment of affirmance was entered in the said supreme court of the State of New York on the twenty-seventh day of June, 1896, with costs in the sum of $100.33, where was drawn in question the validity of a statute of said State and of an authority exercised thereunder, on the ground of their being repugnant to the Constitution and laws of the United States, and the decision was in favor of such their validity, and where titles, rights, privileges, and immunities *was* claimed under the Constitution of the United States and the decision was against the title, rights, privileges, and immunities specially set up and claimed by the said Parke Davis Company under such Constitution and laws, all of which appears

in the record and proceedings in said suit, manifest error hath happened to the great damage of the said Parke Davis & Company:

Wherefore the said Parke Davis & Company, by its attorney aforesaid, prays for the allowance of the writ of error and such other process as may cause the said error to be corrected by the Supreme Court of the United States and the said final judgment to be re-examined and reversed.

JAMES McKEEN,
Att'y for Pl'ff Relator.

56 Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* PARKE DAVIS & Company, Plaintiff,
against
JAMES A. ROBERTS, as Comptroller of the State of New York, Defendant.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of the supreme court of the State of New York in the third judicial department, Greeting:

Because in the record and proceedings, as also in the rendition of judgment of a plea which is in the said supreme court of the State of New York before you or some of you on a remittitur from the court of appeals of the State of New York, being the highest court of law and equity of the said State in which a decision could be had, remitting to you or some of you the final decree or judgment of said court to be in force in the suit between The People of the State of New York *ex rel.* Parke Davis & Company, plaintiff, and James A. Roberts, as comptroller of the State of New York, defendant, wherein was drawn in question the validity of a statute of said State and of an authority exercised thereunder on the ground of their being repugnant to the Constitution and laws of the United States, and the decision was in favor of such their validity, a manifest error has happened, to the great damage of Parke Davis & Com-
57 pany, as is said and as appears by its complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within 30 days from the date hereof, in the said Supreme Court, to be there and then held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and the customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

said Supreme Court, the 4th day of August, in the year of our Lord one thousand eight hundred and ninety-six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
R. W. PECKHAM,
Asso. Jus. Sup. Ct. U. S.
July 31, 1896.

STATE OF NEW YORK, } ss:
City and County of Albany, Clerk's Office, }

I, James M. Borthwick, clerk of the said city and county, and also clerk of the supreme and county courts, being courts of record held therein, do hereby certify that I have compared the annexed copy, petition, and writ of error with the original thereof, filed in this office on the 6 day of August, 1896, and that the same is a correct transcript therefrom and of the whole of said original.

Seal Albany County, July, 1847.

In testimony whereof I have hereunto set my hand and affixed my official seal this 14 day of August, 1896.

J. M. BORTHWICK, *Clerk.*

58 [Endorsed:] Supreme Court of the United States. The People of the State of New York *ex rel.* Parke Davis & Company, plaintiffs, against James A. Roberts, as comptroller of the State of New York. Copy, petition, and writ of error. James McKeen, plaintiff's attorney, 32 Nassau street, New York. Due service of a copy of within petition and writ of error admitted Aug. 10th, 1896. T. E. Hancock, att'y gen'l.

59 Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* PARKE DAVIS & COMPANY, Plaintiff,
against
JAMES A. ROBERTS, as Comptroller of the State of New York, Defendant.

UNITED STATES OF AMERICA, *ss:*

To James A. Roberts, comptroller of the State of New York; Hon T. E. Hancock, attorney general, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, within 30 days from the date thereof, 1896, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of New York in and for the county of Albany, wherein The People of the State of New York *ex rel.* Parke Davis & Company are plaintiffs and you are defendants, to show cause, if any there be, why the judgment in the same writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Seal Albany County, July, 1847.

Witness the Hon. Rufus W. Peckham, associate justice of the Supreme Court of the United States, the 31 day of July, 1896.

R. W. PECKHAM,
Asso. Justice Supreme Court U. S.

STATE OF NEW YORK, *City and County of Albany, Clerk's Office,* } ss:

I, James M. Borthwick, clerk of the said city and county, and also clerk of the supreme and county courts, being courts of record held therein, do hereby certify that I have compared the annexed copy citation with the original thereof, filed in this office on the 6 day of August, 1896, and that the same is a correct transcript therefrom and of the whole of said original.

Seal Albany County, July, 1847.

In testimony whereof I have hereunto set my hand and affixed my official seal this 14 day of August, 1896.

J. M. BORTHWICK, *Clerk.*

60 [Endorsed:] Supreme Court of the United States. The People of the State of New York *ex rel.* Parke Davis & Company, plaintiff, against James A. Roberts, as comptroller of the State of New York, defendant. (Copy.) Citation. James McKeen, plaintiff's attorney, 32 Nassau street, New York. I hereby accept due personal service of this citation on behalf of James A. Roberts, as comptroller, etc., this 10 day of August, 1896. T. E. Hancock, att'y general.

61 Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK, *ex Rel.* PARKE DAVIS & COMPANY, Plaintiff,
against
JAMES A. ROBERTS, as Comptroller of the State of New York, Defendants.

Know all men by these presents that we, Parke Davis & Company, as principal, and John Clay, as surety, are held and firmly bound unto the defendant, The Comptroller of the State of New York, in the full and just sum of five hundred dollars, lawful money of the United States of America, to be paid to the said comptroller of the State of New York; for the payment of which, well and truly to be made, we bind yourselves, our heirs, executors, and administrators by these presents. Sealed with our seals and dated this 29th day of July, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas the above-named Parke Davis & Company has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the supreme court of the State of New York upon remittitur from the court of appeals of the State of New York, in an action wherein The People *ex rel.* Parke Davis &

Company is plaintiff and James A. Roberts, as comptroller of the State of New York, is defendant:

Now, therefore, the condition of this application is such that
62 if the said Parke Davis & Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make the said plea good, then the above obligation to be void else to remain in full force and virtue.

JOHN CLAY [SEAL.]

Sealed and delivered in the presence of—
HENRY F. SMITH.

CITY, COUNTY & STATE OF NEW YORK, *ss.:*

John Clay, the obliger above named, being duly sworn, deposes and says that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

JOHN CLAY.

Sworn to before me this 29th day of July, 1896.
[NOTARY'S SEAL.] HENRY F. SMITH,
Notary Public, Kings County

Cert. filed in N. Y. Co.

STATE OF NEW YORK, }
City and County of New York, } *ss.:*

On this 29th day of July, 1896, before me personally came John Clay, to me personally known and known to me to be the individual described in and who executed the foregoing bond or obligation, and he thereupon acknowledged to me that he executed the same for the purposes therein mentioned.

[NOTARY'S SEAL.] HENRY F. SMITH,
Notary Public, Kings County.

Cert. filed in N. Y. Co.

STATE OF NEW YORK, }
City and County of Albany, Clerk's Office, } *ss.:*

I, James M. Borthwick, clerk of the said city and county, and also clerk of the supreme and county courts, being courts of record held therein, do hereby certify that I have compared the annexed copy of bond with the original thereof filed in this office on the 6 day of August, 1896, and that the same is a correct transcript therefrom and of the whole of said original.

Seal Albany County, July, 1874.

In testimony whereof I have hereunto set my hand and affixed my official seal this 14 day of August, 1896.

J. M. BORTHWICK, *Clerk.*

63 [Endorsed:] Supreme Court of the United States. The People of the State of New York *ex rel.* Parke Davis & Company, plaintiff, against James A. Roberts, as comptroller of the State

of New York, defendant. (Copy.) Bond. James McKeen, plaintiff's attorney, 32 Nassau street, New York. Approved July 31, 1896. R. W. Peckham. Service of a copy of within bond & notice admitted this 10 day of August, 1896. T. E. Hancock, att'y gen'l.

SIR: Please take notice that within is a copy of a bond this day filed with the clerk of the supreme court, at Albany.

Dated August 8th, 1896.

JAMES McKEEN,
Att'y for Parke Davis & Co.

64 Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* PARKE DAVIS & COMPANY, Plaintiff,
against
JAMES A. ROBERTS, as Comptroller of the State of New York, Defendant.

Of October term, in the year of our Lord one thousand eight hundred and ninety-six.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the same Parke Davis & Company, by James McKeen, their attorney, and says that in the records and proceedings aforesaid and also in said judgment there is manifest error in this, to wit, that in the record aforesaid it appears that the judgment aforesaid was given for the said defendant and against the said plaintiff, relator, whereas by the law of the land the judgment should have been given for the said relator against the said defendants, and also in this, to wit, that the said relator claimed that it was entitled to be repaid the amount of the taxes paid by it and was entitled in the court of appeals of the State of New York to a reversal of the determination and judgment of the supreme court adjudging that the relator pay to the defendant $50, costs and disbursements, and that the decision of
65 the comptroller of the State of New York be in all respects confirmed and the writ of certiorari herein be dismissed and quashed on the ground, to wit, the court erred in deciding that L. 1880, ch. 542, of the State of New York, as amended by Laws of 1881, ch. 361; L. 1882, ch. 151; L. 1885, ch. 359 and 501; L. 1889, ch. 353, and L. 1890, ch. 522, and the authority attempted to be exercised within the State of New York and dependent upon the said statute were not repugnant to the Constitution of the United States and were valid, the validity of said statute and said authority having been drawn in question in said suit on the ground of their being repugnant to the Constitution of the United States for the following reasons: (*a*) as being a regulation of interstate commerce; (*b*) as being a regulation of commerce with foreign nations and an imposing of duties and imposts on imports; (*c*) as being a

denial to plaintiff by the State of New York of the equal protection of the laws; (*d*) as being a deprivation by the State of the property of plaintiff without due process of law.

JAMES McKEEN,
Att'y for Plaintiff, Relator.

STATE OF NEW YORK,
City and County of Albany, Clerk's Office, } ss:

I, James M. Borthwick, clerk of the said city and county, and also clerk of the supreme and county courts, being courts of record held therein, do hereby certify that I have compared the annexed copy assignment of errors with the original thereof, filed in this office on the 6 day of August, 1896, and that the same is a correct transcript therefrom and of the whole of said original.

Seal Albany County, July, 1847.

In testimony whereof I have hereunto set my hand and affixed my official seal this 14 day of August, 1896.

J. M. BORTHWICK, *Clerk.*

66 [Endorsed:] Supreme Court of the United States. The People of the State of New York *ex rel.* Parke Davis & Company, plaintiffs, against James A. Roberts, as comptroller of the State of New York. (Copy.) Assignment of errors. James McKeen, plaintiff's attorney, 32 Nassau street, New York. Service of within assignment of errors admitted this 10 day of August, 1896. T. E. Hancock, att'y general.

Endorsed on cover: Case No. 16,368. New York supreme court. Term No., 221. The People of the State of New York *ex rel.* Parke Davis & Company, plaintiff in error, *vs.* James A. Roberts, comptroller of the State of New York. Filed August 20, 1896.

21.

No. 221.

Evening Post Job Printing House—N. Y.

Brf. of McKeen for P. E.

Filed Jan. 20, 1898.

Supreme Court of the United States,

OCTOBER TERM, 1897.

No. 221.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* PARKE, DAVIS & COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES A. ROBERTS, COMPTROLLER OF THE STATE OF NEW YORK, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

JAMES MCKEEN, Attorney for Plaintiff in Error,
32 Nassau St., New York.

Statement of the Case.

The writ of error was sued out to review final judgment entered in the New York Supreme Court upon a remittitur from the Court of Appeals, confirming a tax imposed upon the relator, the validity of the statute and authority under it having been drawn in question as repugnant to the Constitution. The errors are formally assigned in the Record at page 39.

The facts are not in dispute, and are stated with substantial accuracy, in the opinion of the State Court, at page 28 of the Record.

Those which are material to the points here raised may be briefly recapitulated.

Parke, Davis & Co., the relators, are a corporation organized under the laws of Michigan solely for manufacture and sale of chemical and pharmaceutical preparations. Formerly they consigned goods of their manufacture to a drug house in New York for sale on commission. Wishing more exclusive attention given to the disposition of their products they established a depot in New York and consigned their goods to Mr. John Clay, who was paid a salary instead of commission. A debit and credit account was kept with Mr. Clay. He accounted for sales in the same manner as a commission merchant does. The goods so consigned and sold and distributed were in the original packages. No jobbing business in articles manufactured by other parties was conducted. Parke, Davis & Company use in their laboratory large quantities of imported drugs. Mr. Clay having lived many years abroad, and being very familiar with foreign markets, it occurred to him he might import these drugs, and might incidentally import and dispose of more than the corporation required for their own use. They consented that this might be done, with the condition that "they would not invest a dollar of capital." This business in crude drugs was done chiefly on credit, and the drugs so imported were sold in the original packages, Mr. Clay however accounting to the corporation for any profits after being himself released from responsibility. As an incident of the business in crude drugs, some such drugs were purchased in the New York market, and some of these not required by the Detroit factory were resold. But the average of the total yearly sales of such purchases did not exceed $38,000. The average quantity of goods made in Michigan and carried in the original packages at the New York office was $50,000 value, and about the same amount

was carried of the crude drugs imported by Mr. Clay. The value of the plant used in New York for the conduct of the business did not exceed $15,000.

Upon this state of facts the Comptroller of New York imposed for 1894 and five previous years a tax for each of the years based upon $90,000 as "capital employed within the State," which was made the basis of the special State tax here in question, known as the franchise tax.

At the time of the imposition of this tax the provisions of the statute here drawn in question were as follows (Sec. 3, Chapter 542, Laws of 1880, as amended by Laws of 1881, Chap. 361; Laws of 1885, Chap. 359; Laws of 1889, Chaps. 193 and 353): "Every corporation, joint stock company, or association whatever, now or hereafter "incorporated, organized or formed under by or "pursuant to law in this State or in any other State "or country and doing business in this State, except "only saving banks and institutions for savings, life "insurance companies, banks, foreign insurance "companies, *manufacturing or mining corporations or companies wholly engaged in carrying on "manufacture* or *mining ores within this State*, "and agricultural and horticultural societies or "associations, which exceptions, however, shall not "include gas companies, trust companies, electric "or steam heating, lighting and power companies, "shall be liable to and shall pay a tax as a tax upon "its franchise or business into the State treasury "annually, to be computed as follows:"

Then come provisions grading the tax according to annual dividends. The tax originally fell upon the entire capital of a corporation, but the statute was amended in 1885 so as to read: "The amount of "capital stock *which shall be the basis* for tax under the provisions of section three (*supra*) in the case of every corporation, joint stock company and association liable to taxation thereunder shall be the

amount of capital stock employed within this State." * * *

Laws 1880, Chap. 542, Section 11, as amended by Laws 1885, Chap. 501.

Other facts and statutory provisions can be more satisfactorily stated in connection with a discussion of the legal questions.

ARGUMENT.

I.—This tax law as it stood prior to the amendments of 1885 has been the subject of consideration in this court in two previous cases.

Home Ins. Co. vs. *New York*, 119 U. S., 129; 134 U. S., 594.

Horn Silver Mining Co. vs. *New York*, 143 U. S., p. 306.

In the Home Insurance Company case the question was whether Government bonds held by the corporation could be treated as part of its capital upon which the tax could be computed. This Court held that such bonds were not exempt, because the tax was one imposed upon a corporate franchise conferred by the State. It is to be observed that the case arose prior to the amendment of 1885, which distinctively made the basis of the tax the capital employed within the State.

The Horn Silver Mining Company, though incorporated in Utah, had its corporate headquarters in New York. The stockholders, directors and other officers there conducted its operations. The bullion produced in Utah was not only sold in New York, but the proceeds were there used and loaned. In that case also the tax had been imposed under the statute as

it stood prior to the amendment of 1885. And this Court held that the tax was valid as one imposed upon the privilege given to a foreign corporation to carry on business in New York. The validity of taxes imposed by the States upon corporations is a matter which has been so often before this Court that the effort will be made in this argument to confine discussion to the distinctive points presented by this record. And the Court's attention is asked chiefly to questions now arising which were not presented nor involved in either of cases above mentioned.

II.—The statute as interpreted and enforced by the New York Court, (*a.*) Exempts corporations, foreign and domestic, which both manufacture and sell their products in the State; (*b.*) Thus imposes a discriminating tax upon these relators for selling in New York in the original packages their products made in Michigan.

To all intents and purposes Parke, Davis & Co. are told that to gain exemption from the tax they must move their laboratory from Detroit to New York.

It is believed that this discrimination comes within the prohibition of a line of authoritative decisions by this Court. No contention is here made that a corporation or individual of another State ought to gain any advantage over corporations or citizens in New York by the assertion of interstate commercial rights under the Federal Constitution. The learned Justice in the opinion in the State court (Record, pp. 28–30) wholly misapprehended the relator's contention. No occasion existed to combat the proposition held in *Paul* v. *Virginia*, 8 Wallace,

168, and in the other cases cited and reaffirmed in the *Horn Silver Case*, 143 U. S., 306.

It is not disputed by the defendant in error that at the time of the imposition of this tax Parke, Davis & Co. had complied with all the conditions entitling them to do business in New York, and had been subjected to such property taxes as were imposed upon other manufacturing corporations.

It was contended by us in the State court that by proper construction of the exemption clause in the statute all "manufacturing corporations" are exempt; that the words "*or companies wholly en-*" *gaged in carrying on manufacture or mining ores* "*within this State*" should be construed as exempting besides "manufacturing or mining "corporations" already specially exempted. "companies" which, though not technically incorporated as manufacturing or mining, or even incorporated for some other purpose, engaged in no business in New York other than manufacturing or mining. Such, for example, as certain transportation companies, which make their own wagons and implements, and packing companies which do nothing in New York but mine salt. This contention was overruled, the Court adhering to certain previous *dicta* that the legislative intent was to make the "*wholly engaged* in *manufacturing within the State*" the condition of the exemption.

The Court below disregarded the further contention there made, and here urged, that this construction and application of the statute involve an unjust and unconstitutional discrimination against the sale of goods made in another State.

The distinctively interstate commerce questions will be more fully considered later. But it is here to be observed, in passing, that the cases above cited make the reservation that the right of the States to exclude entirely foreign corporations is limited to such exclusion as does not impair the freedom of interstate commerce.

The same limitation has been recognized by the New York Court of Appeals in other cases. Thus in the *Pennsylvania R. R. Case*, 138 N. Y., p. 1, that Court held this same act unconstitutional in so far as it made the terminal property of the railroad in New York a basis of the tax, on the ground that such property was directly used in interstate commerce, And in an exhaustive opinion Chief Judge Andrews said (138 N. Y., pp. 6 and 7): "Corporations engaged "in both State and interstate commerce may law- "fully be subjected by the State to a franchise tax " measured by its whole capital or business, or in " any other way in the discretion of the Legislature, " without taking notice of the part of its business " arising from interstate commerce, *provided no* " *hostile discrimination is made against such part.*'

The cases in this Court chiefly relied upon as authorities for the proposition that a State cannot rightfully thus discriminate against goods of other States are,

Tiernan vs. *Rinker*, 102 U. S., p. 123,

where a Texas statute which taxed the business of selling liquors, but provided that it should not apply to wines or beer manufactured in the State, was held inoperative in so far as it was attempted to be applied to wines and liquors brought from other States and separately sold.

Walling vs. *Michigan*, 116 U. S., 446,

where a similar tax statute of Michigan was held void because making like discrimination against liquors, the products of other States.

Welton vs. *Missouri*, 91 U. S., 275,

where a license tax in Missouri was held unconstitutional because of its discrimination against the selling sewing machines made elsewhere.

In *Covert* vs. *Missouri*, 156 U. S., p. 296, the validity of the tax is sustained because the statute had been so amended as no longer to make such discrimination. In both these cases the Singer Sewing

Machine Co. was the real party in interest, the point being the validity of a tax upon the privilege of selling their machines in that State.

We also rely upon the line of cases, not distinctively tax cases, but where discriminating burdens have been put upon interstate business (*e. g.*):

Minnesota vs. *Barber*, 136 U. S., 313, where the sale of meats was prohibited unless the animals were submitted to State inspection before being slaughtered.

Brimner vs. *Rebman*, 138 U. S., p. 78, where a similar inspection, with incidental tax, discriminated against meats slaughtered more than one hundred miles from the place of sale.

In *Minnesota* vs. *Barber*, the contention was made that there was no unconstitutional discrimination, because all butchers were at liberty to bring their cattle within the State before slaughter. But this Court overruled this contention, which manifestly begs the whole question.

Voight vs. *Wright*, 141 U. S., 62, where a Virginia statute was held unconstitutional which compelled inspection of flour manufactured in other States, exempting from like inspection flour made in Virginia.

We rely also upon the reservation made in the decisions of this Court, sustaining franchise taxes. *e. g.:*

In *Postal Telegraph Co.* vs. *Adams*, 155 U. S., 689, where a franchise tax based on property within the State used for interstate commerce is held valid, being a tax *in lieu* of others directly upon the property. In 155 U. S., at page 696, the learned Chief Justice observes: "Doubtless no State could add to "the taxation of property according to the rule of "ordinary property taxation the burden of a license "or other tax on the privilege," &c.

And at page 698: "The taxation was neither ar-"bitrary nor discriminating."

In *Merchants' Bank* vs. *Pennsylvania*, 167 U. S., page 461, the Court held that a merely possible lack of uniformity is not fatal to the validity of a tax. "An option, which if not availed of by all may produce an inequality, is offered to all."

And in *Adams et al.* vs. *Ohio*, 165 U. S., 194, where the whole subject was so exhaustively argued and so fully considered by the Court, no discriminating tax was imposed upon the express companies.

III.—The learned Justice, writing the opinion in the State court, also misapprehended the contention made as to the relation of Mr. Clay to the business (see Record, p. 29). What we urged was that the corporation did not exercise in New York a corporate franchise as to certain portions of the business there conducted. Their sole corporate franchise is for manufacture and sale. They in fact sought in New York to exercise no other. But, assuming that the business of importing crude drugs and selling them in the original packages, as conducted by Mr. Clay, be corporate business, manifestly it is one which cannot be the basis of a State tax.

Brown vs. *Maryland*, 12 Wheaton, 419. This surely is a "franchise," guaranteed alike to individuals and corporations, free from State exaction.

We have here no occasion to dispute that property employed in such a business may in some way be subjected to its proper share in paying taxes for State governmental support. But taxation for the "franchise or business" of importing goods and once selling them is a power unequivocally surrendered by the States to the Federal Government.

IV.—It might be fairly contended that irrespective of the discriminating features here chiefly urged, the tax upon the franchise or business of selling their own goods in New York, imposed upon the relators is unconstitutional in the absence of a permission from Congress. This is a fair deduction from the original package cases in this court.

Leisy vs. *Hardin*, 135 U. S., 100.

And it is a proposition sustained by *Robbins* vs. *Shelby County*, &c., 120 U. S., page 489, and by *Cooper* vs. *Ferguson*, 113 U. S., 727.

In the latter case, in concurring in the result, Justices Matthews and Blatchford said: "It is quite "competent no doubt for Colorado to prohibit a for- "eign corporation from carrying on within that "State its business of manufacturing machinery, "but it cannot prohibit it from selling in Colorado "by contracts made there its machinery manufac- "tured elsewhere, for that would be to regulate com- "merce between the States."

In the *Horn Silver Company* case, 143 U. S., p. 306, that corporation claimed benefit from this line of decisions. In his brief in opposition, Attorney-General Tabor said (page 27 of his brief): "If the "plaintiff in error was simply selling its products "here (*i. e.* in New York) there would be, perhaps, "some force in the contention that the statutes un- "der consideration imposed a condition upon or "tended to regulate, interfere with or hamper the "sale of foreign goods or productions within the "principles of the cases cited."

He then proceeded to show, what was indisputable, that the Horn Silver Company not only made New York its corporate headquarters, but used in New York, for business benefits, the proceeds of bullion there sold.

The same state of facts has appeared in other cases in the State court, where the contention has been overruled, *e. g. People ex rel. Western Electric Co.*

vs. *Campbell*, 145 N. Y., 587; *People ex rel. Southern Cotton Seed Oil Co.* vs. *Wemple*, 131 N. Y., 64. In neither of these cases was it true, or pretended to be, that the corporations were not carrying on a general business in New York. In neither of them was the discriminating character of the exemption, hereinbefore considered, raised or applicable. The Southern Cotton Oil Company brought suit in the United States Circuit Court.

S. C. O. Company vs. *Wemple*, 44 Fed. Rep., 24.

It was manifestly an effort to gain exemption on the Interstate commerce theory, and thus have an advantage over domestic corporations subjected to the tax. The United States Circuit Court sustained the validity of the tax substantially in accordance with the rulings of this Court in the Horn Silver Case, the discriminating character of the tax not being presented.

V.—The tax here in question cannot be maintained as one imposed to reimburse the State for any police supervision over foreign corporations there selling their own goods.

By the terms of the statute the tax is payable into the State Treasury. And by Section 9, "The "taxes imposed by this act, and the revenue derived "therefrom, shall be applicable to the ordinary and "current expenses of the State."

Laws 1880, Chap. 542, Sec. 9, as amended by Laws 1881, Chap. 361.

The relators are a private corporation rendering no public service warranting special exactions. In *Charlotte R. R. Co.* vs. *Gibbs*, 142 U. S., p. 386, the question was as to the validity of a

tax, special in its nature, which was imposed to cover the expense of the South Carolina Railroad Commission. Mr. Justice Field took occasion to say: "If the tax were levied to pay for services in "no way connected with railroads, as, for instance, "to pay salaries of judicial and executive officers "of the State * * * there would be just ground "of complaint" (142 U. S., at p. 391).

So also certain regulations, not operating with entire uniformity, have been sustained because for the protection of the public.

VI.—Doubtless the patience of the Court has often been abused by efforts to extend beyond their fair scope the provisions of the Fourteenth Amendment prohibiting the denial to any person within the jurisdiction of a State "the equal protection of the law." This Court have often had occasion to call attention to the primary purpose of that amendment, which was aimed at discriminating race legislation. But that the provision may be invoked in behalf of corporations, as well as individual citizens, to prevent unfairly distributed burdens of taxation is not open to question.

And our contention is that these relators, having come within the jurisdiction of New York by compliance with all the provisions of law imposing conditions for transacting business within the State, are denied equal protection of the law when subjected to a tax from which are exempted other corporations, foreign and domestic, which wholly manufacture the same class of goods within the State.

The law as interpreted and enforced has all the attributes of a protective tariff. This is frankly, though perhaps unconsciously, recognized in the opinion of Chief Judge Andrews in the *Tiffany Case*, 144 N. Y., at page 171. (This case will be later referred to in another connection.) "The plain object

"of the exemption of manufacturing corporations "carrying on manufacturing in this State from "taxation by the Act of 1880, was the encourage- "ment of production, and it was assumed that the "employment of capital and labor in the business "of manufacture here was a just ground for the "exemption."

That a State may, by laws applying with uniformity to persons and classes of persons, including corporations and classes of corporations, encourage within its borders certain kinds of enterprise is not questioned. That it may exempt entirely from taxation certain kinds of property and certain classes of corporations has been frequently decided, and is not here questioned. But it cannot, under the guise of a franchise or business tax, give its own manufacturers special advantage in the business of selling their products.

VII.—Where, as here, exemptions are so incorporated in a tax law as to result in unconstitutional discrimination, the whole law falls.

Spraigue vs. *Thompson*, 118 U. S., pp. 90, 95.

And if the acts of State officials, under a law valid on its face, contravene the safeguards of the Constitution, such acts will be held invalid.

Yick Wo vs. *Hopkins*, 118 U. S., p. 356.

The method of the Comptroller in fixing this tax was palpably unjust. Assuming the relators to be subject to such a tax upon its franchise or business, the basis of it was the capital employed in the State in conducting such business. The value of the property used in conducting the business did not exceed $15,000 (Record, p. 22). In the first instance

the Comptroller fixed the "capital employed" at $100,000, and later reduced it to $90,000. Although the return to the writ does not disclose exactly how these figures were reached, it is obvious, and has hitherto been conceded, that the Comptroller considers the average stock of goods carried in the New York warehouse as a measure of "capital employed" in New York, although it was testified without contradiction that the proceeds of sales, less expenses, were in the course of business, remitted to Michigan, and that the stock carried in New York was there merely for convenience in distribution (Record, p. 20). It has been repeatedly held in the New York courts that the average stock of consigned goods is no measure of "capital employed."

See *People ex rel. Parker Mills* vs. *Commissioners*, 23 N. Y., p. 242.

It is only in a jobbing business that the average stock is any measure of capital employed. The place where a manufacturer employs his capital is the place where the raw material is converted into a finished product, here in the State of Michigan. Neither do the aggregate sales or expenses of sales furnish any test of "capital employed." The sales and expenses of the New York office shown in the record covered sales and expenses for the whole eastern section of the country, many sales being made in other States by traveling agents and merely registered at the New York office for convenience.

Such arbitrary and palpable disregard by a State officer of the legal and economic definition of the words "capital employed," amounts to a denial of due process of law, and a confiscation of private property for a public use without compensation.

VIII.—The learned Justice in the State court also misapprehended the application of the case. *People ex rel. Tiffany & Co.* v. *Campbell*, 144 N. Y., p. 166 (above referred to).

In that case the State sought to tax Tiffany & Co. upon the basis of their entire business. They claimed entire exemption because a "manufacturing corporation." The Court of Appeals modified the tax so as to exempt so much of the business as consisted in selling their own manufactures.

It was shown and conceded that the other business was *ultra vires*, but the Court held that the State not having interfered to prevent this *ultra vires* business, Tiffany & Co. were taxable upon it as a franchise which the State permitted them to exercise.

The case has no application here unless as bearing on the small and incidental business in selling certain crude drugs purchased in New York and not required by the relators for their own use. As already pointed out, this was done in connection with the importation of crude drugs by Mr. Clay. This Court has never adopted the New York doctrine as to *ultra vires* transactions, and where parties appeal to this Court for Federal protection against unfair State exaction, it seems that this Court may withhold assent from a doctrine that a State, on the plea of taxing a corporate franchise, can tax a business outside the franchise, practically conducted on an agent's individual responsibility.

The discriminating injustice of the tax here imposed is emphasized by the *Tiffany* decision, where the Court exempted from the tax the manufacturing part of the business. On this point the reasoning of the Comptroller's counsel here seems to be, "conceding, for argument, that you cannot rightfully "be taxed on the privilege of selling in New York "your own products, your agents do there a small "amount of business beyond that; therefore we "tax you on the basis of your entire business."

New York excludes many foreign banks from conducting banking business in the State. This has not been construed to prohibit individual bankers from acting in matters for which they are accountable to foreign banks as their principals. There is thereby no exercise in New York of the corporate banking franchise, the agents assuming individual responsibility for their acts. The Comptroller has not hitherto held that manufacturing corporations of other States are taxable in New York where they sell their goods through commission merchants in New York, though such merchants are known and recognized as agents of the corporations, and the latter retain title to the goods and their proceeds.

IX.—In substance the discriminating tax as here imposed was imposed upon goods brought into New York for sale in the original packages. The average stock of such goods was indisputably made the basis of the tax. It has been repeatedly held in this Court that a tax upon the distinctive business or franchise of selling such goods is a tax upon the goods.

True, in the *Home Insurance Co.* case, 119 U. S., 133; 134 U. S., 594, it was held that the tax being one upon the corporate franchise was not a tax upon the Government bonds, which were a part of the capital. The cases, however, are entirely different. The business there taxed was an insurance business. The Government bonds held were part of a permanent capital and used as such capital. They were credited to the company by the State as part of the reserve which measured the volume of its insurance business.

The Court therefore held that the Government bonds were merely a factor in the computation of a tax which was imposed not upon them but upon something else which the State could lawfully tax.

In the income tax cases the learned Attorney-General earnestly contended that this principle was applicable; that the tax was imposed upon citizens, the income being a mere measure of the tax; that it was not imposed upon property which was the source of the income; but the Court declined to sustain that contention. Here the tax is imposed directly, *first*, upon a privilege or franchise which is exempted when exercised by corporations manufacturing within the State; and, *second*, it is made to fall upon property which the relators have a right to sell free from any such discriminating imposition.

The case of *Pembina Mining Co.* vs. *Pennsylvania*, 125 U. S., 181, has been appealed to as a decision upholding a State license tax similar to this. But the decision in that case was essentially like that in the *Horn Silver*. The statute exacted a license fee for having an office in the State for the use of the "officers, stockholders, agents or em-"ployees." In the opinion sustaining the validity of the tax Mr. Justice Field observed: "No tax upon "the franchise of the foreign corporation is levied, "nor upon its business or property without the "State. A license tax only is exacted as a condi-"tion of its keeping an office within the State for "the use of its officers, stockholders, agents and "employees. Nothing more. Nothing less" (125 U. S., 186).

As concisely stating the distinctive contentions here made on behalf of the plaintiff in error, the Court's attention is asked to the language of Mr. Justice Bradley in the case *Brown* vs. *Houston*, 114 U. S., at p. 622. The Court in that case held that a cargo of coal shipped from Pennsylvania to New Orleans was not exempt from an assessment laid upon it under the Louisiana law In illustrating the rule Mr. Justice Bradley observed: "It cannot "be seriously contended, at least in the absence of "any congressional legislation to the contrary, "that all goods which are the products of "other States are to be free from taxation

"in the State to which they may be carried "for use or sale. Take the City of New York, for "example. When the Assessor of Taxes goes his "round must he omit from his list of taxables all "goods which have come into the city from the "factories of New England and New Jersey or "from the pastures and grain fields of the West? "If he must, what will be left for taxation? And "how is he to distinguish between those goods "which are taxable and those which are not? With "the exception of goods imported from foreign "countries still in the original packages, and goods "in transit to some other place, why may he not "assess all property alike that may be found in the "city, being there for the purpose of remaining "there till used or sold, and constituting part of the "great mass of its commercial capital, *provided "always that the assessment be a general one, and "made without discrimination between goods the "product of New York and goods the product of "other States? Of course the assessment should "be a general one, and not discriminative between "goods of different States*" (114 U. S., p. 633).

X.—The judgment of the New York Supreme Court should therefore be reversed and the case remanded with instructions accordingly.

Respectfully submitted,

JAMES MCKEEN,
Of Counsel to Relators, Plaintiff in Error.

No. 221. 21.

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JAMES H. Mc

Brief of Hancock for D. C

Filed Jan. 24, 1898.

IN THE

SUPREME COURT

OF THE

UNITED STATES,

OCTOBER TERM, 1897.

No. 221.

THE PEOPLE OF THE STATE OF NEW YORK, EX REL. PARKE, DAVIS & CO.,
Plaintiffs in Error,

against

JAMES A. ROBERTS, *Comptroller of the State of New York,*
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

T. E. HANCOCK,
Attorney-General, State of New York,
Counsel for Defendant in Error, Capitol, Albany, N. Y.

ALBANY:
THE BRANDOW PRINTING CO., PRINTERS.
1897.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

UNITED STATES SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK, EX REL. PARKE, DAVIS & COMPANY, PLAINTIFFS IN ERROR, *agst.* JAMES A. ROBERTS, COMPTROLLER OF THE STATE OF NEW YORK, DEFENDANT IN ERROR.	No. 221.

Brief of Attorney-General, State of New York, on behalf of defendant in error, James A. Roberts, Comptroller of the State of New York.

STATEMENT.

This case is brought into the Supreme Court of the United States for the purpose of reviewing the decision and determination of the Comptroller of the State of New York, in imposing a corporation tax upon the plaintiff in error, in accordance with the laws of that State,

and the decision of the State courts in affirming the determination of the Comptroller.

The Comptroller imposed a tax upon the corporation, and settled an account therefor, including penalty, in the sum of $1,386, for the six years ending November 1, 1894. The tax was at first fixed at $1,540. (Pages 9 and 10.) Upon a rehearing had upon application of the corporation, the amount of the tax was reduced to the sum first above stated. The Comptroller appraised the amount of the corporation's capital employed in this State during the years in question at the sum of $90,000. (Pages 4 and 25.)

The plaintiff in error is a corporation organized pursuant to the Laws of the State of Michigan, employing a large portion of its capital and doing business in New York (pages 9 and 10), but failed and refused to make any report to the Comptroller in accordance with the provisions of section 1 of the Corporation Tax Law; whereupon an examination was had before a commissioner, in accordance with the provisions of section 13; and a rehearing was had before the Comptroller upon application of the corporation in accordance with the provisions of section 19 of said law.

From the evidence it appears that the corporation had an office and place of business at 92 Maiden Lane, New York city (page 22), paying an annual rental of $12,500, employing a force of over fifty people, and paying the general manager of the company's business in New York a salary of $8,000 per annum; running the New York, branch at an average yearly expense of from $102,000 to $172,000, for the years 1890 to 1894, inclusive. The valuation of the property owned by the corporation in

this State, in the line of desks, safes, furniture, etc., is stated at $15,000 (page 22); the average stock of goods sent from Michigan and carried in New York was $50,000 (pages 12 and 20); the average bank balance appears to be $10,000. Also during those years it employed a continuing capital used in purchasing and selling in the open market in New York crude drugs, amounting to from $23,000 to $62,000 per year. (Page 21.) Goods were also imported from Europe. The manager of the corporation, in his examination before the commissioner, made the following statement of business done in New York city and also in the country. (Page 17.)

Sales: City, 1890, $259,925 85; 1891, $316,561.84; 1892, $330,860.38; 1893, $355,402.62; 1894, $358,417.97.

Country, $225,089.74, $248,076.01, $278,190.23, $263,892 03, $294,004.01.

Total, $482,915.57, $564,637.85, $607,050.61, $619,-094.85, $652,421.98.

City account (same years), annual net expenses, $86,810.79, $110,608.73, $133,785.03, $131,625.51, $147,-171.99.

Inventory, $79,288.67, $76,841.84, $101,155.78, $91,-629.77, $108,478.04.

Objections raised before the Comptroller and in the State courts.

The objection specified by plaintiffs in error to the payment of a corporation tax may be summarized as follows:

1. That the corporation is engaged in manufacturing, and, therefore, exempted from the payment of a corporation tax.

An examination of the statute itself very clearly indicates that there is nothing to this objection. The exemption clause in section 3 of the act provides "except * * * manufacturing or mining corporations or companies wholly engaged in carrying on manufacturing or mining ores within this State." * * *

The meaning of the language quoted has been construed by the State courts. It is to be noted that the exemption pertains to corporations or companies wholly engaged in carrying on manufacturing or mining ores *within this State.*

In the case of People ex rel. Tiffany & Co. v. Campbell, 144 N. Y. 166, the court says, at page 171:

"We do not assent to the claim of the relator's counsel that the words '*wholly engaged in*,' contained in the amendment of 1889, do not apply to manufacturing corporations. The plain object of the exemption of manufacturing corporations carrying on manufacture *within this State*, from taxation, by the act of 1880, was the encouragement of production, and it was assumed that the employment of capital and labor in the business of manufacturing here was a just ground for the exemption. The object of the amendment of 1889 was not to withdraw the protection given by the act of 1880, but to define more specifically than in the prior act, the purpose that the exemption should be confined to corporations whose corporate business was exclusively that of manufacture."

The statutory intent is very thoroughly considered in the case of People ex rel. Blackinton Co. v. Roberts, 4 Appellate Division, 388, where it appears that a domestic corporation was engaged in manufacturing in another State, and where the court discussed and reviewed the

authorities bearing upon not only the letter but intent of the statute, holding that the exemption clause applied to corporations wholly engaged in manufacturing in the State of New York, and that the reason of the exemption is the desire on the part of the State to bring within its borders the advantages which attend the maintaining of large establishments in the employment of many men therein. This decision (People ex rel. Blackinton Co. v. Roberts) was affirmed in 151 N. Y. 652.

The plaintiff in error was not wholly engaged in manufacturing in the State of New York, and in fact did no manufacturing business in that State, and it appears unnecessary to multiply authorities, even if that question were before the Supreme Court of the United States.

People ex rel. W. E. Co. v. Campbell, 145 N. Y. 587.
People ex rel. T. & Co. v. Campbell, 144 N. Y. 166.
People ex rel. S. T. C. Co. v. Wemple, 133 N. Y. 323.

Furthermore, the burden was clearly upon the plaintiff in error to establish its exemption from taxation.

Ford v. Delta & Pine Land Co., 164 U. S. 662.
C. B. Co. v. City of New Orleans, 99 U. S. 97.
People ex rel. T. & Co. v. Campbell, 144 N. Y. 166.
Knapp v. O'Neil, 46 Hun, 317-318.
Sherrill v. Hewitt, 36 N. Y. St. Repr. 321.
Butler v. City of Oswego, 56 Hun, 358.

2. It was further contended by the corporation that it was not doing business in the State of New York, or

exercising any corporate franchises therein, the corporation claiming that Mr. John Clay, the manager and agent of the corporation, was engaged in transacting business in the State of New York, and not the company itself.

This contention of the plaintiff in error appears to be so thoroughly controverted by the evidence that it seems unnecessary to comment upon it at all in this court. It is sufficient to say that Mr. Clay was to all intents and purposes the agent of the company. He was paid a salary for his services; he accounted to the company for the sales made at or through the New York office; the rents, taxes, repairs, salaries and all the expenses connected with the business were paid by the corporation, and the profits of the business went to Parke, Davis & Co.

3. It was further urged that the tax imposed by the Comptroller was too large. The amount of capital employed in this State, exclusive of goods imported from Europe, was at least $90,000 per annum.

It has been repeatedly held by the courts of the State of New York that the estimate of the Comptroller in determining the *amount of capital* employed in the State will not be interfered with, unless it is clearly established that the same was erroneous.

People ex rel. A. C. & D. Co. v. Wemple, 129 N. Y. 558.
People ex rel. S. C. O. Co. v. Wemple, 131 N. Y. 64.
People ex rel. P. R. R. Co. v. Wemple, 138 N. Y. 1.
People ex rel. Singer Mfg. Co. v. Wemple, 150 N. Y. 46.

4. There were also certain general allegations to the effect that the Tax Law is unconstitutional. At page 18, it is stated as an objection: "If the act be construed as imposing a liability on the ground that this corporation is not wholly engaged in manufacturing in the State of New York, it is clearly unconstitutional as a discriminating tax." At page 11: "If the construction of the act which had been intimated in certain *dicta* of the Court of Appeals, be that manufacturing corporations wholly engaged in manufacturing in this State are exempt, but that manufacturing corporations in other States and only partially here, or not at all, are not exempt, then the act is plainly unconstitutional." In the petition for a writ of *certiorari*, at page 5, it is declared: "That if the statute be correctly interpreted by the Comptroller as not exempting said corporation from taxation thereunder, then said statute is unconstitutional and void, and as in contravention of the Constitution of the United States and the amendments thereof."

None of these general claims or charges that the statute is unconstitutional, either *per se* or as applied to the facts of this particular case, appear to have been urged before the Comptroller or to have been considered by that official or the courts of the State of New York, except the charge of discrimination.

Article IV, Section 2, Constitution.

It may be very seriously doubted whether any other constitutional question is before the Supreme Court of the United States for review.

A constitutional objection taken in the State court can not be noticed in the Supreme Court on a writ of error

unless it is sufficiently specific, and a mere general objection of no constitutionality is not sufficiently specific.

Messenger v. Mason, 10 Wall. 507.
Maxwell v. Newbold, 18 How. (U. S.) 511.

Moreover, under the practice in the State of New York, the facts alleged in the petition upon which the writ of *certiorari* is issued form no part of the record for examination by the appellate court. The return to the writ contains all of the record which is considered in determining whether, or not, the judgment sought to be reviewed is proper; and the return of the Comptroller to this writ of *certiorari* shows, that the questions of constitutionality now sought to be raised were not considered by him; neither were they passed upon or presented to the Appellate Division or the Court of Appeals, except as before stated.

They are first squarely presented for the consideration of any court by the petition for a writ of error; but that is no part of the record before this court.

Warfield v. Chaffee, 91 U. S. 690.

It is not sufficient to show that a question might have arisen or been applicable to the case, unless it is further shown on the record that it did arise and was applied by the State court to the case.

Hager v. California, 154 U. S. 639.
Crowell v. Randall, 10 Peters, 368.
Edwards v. Elliot, 21 Wall. 532.
Ocean Ins. Co. v. Polleys, 13 Pet. 157.
Walker v. Villavaso, 6 Wall. 124.
Rector v. Ashley, 6 Wall. 142.
Gibson v. Chouteau, 8 Wall. 314.
Phœnix Ins. Co. v. Treasurer, 11 Wall. 204.
Otis v. Oregon S. S. Co., 116 U. S. 548.

5. It is to be remembered that under the practice in the State of New York the return of the Comptroller (this being made in answer to a writ of *certiorari*) is conclusive as to the facts.

People ex rel. Edison Co. v. Campbell, 88 Hun, 530.
People ex rel. Miller v. Wurster, 149 N. Y. 549.
People ex rel. Anderson v. Hoag, 42 N. Y. Supp. 886.

The return of the Comptroller must be taken as conclusive.

People ex rel. Sims v. Fire Comm., 73 N. Y. 437.
People ex rel. Roebling's Sons v. Wemple, 138 N. Y. 582.
People ex rel. Press Pub. Co. v. Martin, 142 N. Y. 228.

It appears from the return (page 10) that "the relator, "during the years in question, was employing a large "amount of its capital within this State, and was not "wholly engaged in manufacture within this State, and "the tax so levied against it by the Comptroller was and "is valid in all respects, and the relator is liable to pay "the same as and for capital employed by it within this "State; that the relator was engaged in the sale of goods "not manufactured by it within this State, and large "sales were made of large quantities of goods annually. "Business was carried on in this State by the relator, and "it empl yed its capital in such manner as to render it "liable to taxation in this State."

Provisions of the Corporation Tax Laws of the State of New York.

The law in force at the time this tax was imposed appears in full, sections 1 to 20, in Banks and Brothers' 9th Edition, Revised Statutes, State of New York, Vol. 3, pages 2493 to 2505. (Laws 1880, chap. 542; amended, Laws 1881, chap 361; Laws 1882, chap. 151; Laws 1885, chaps. 359 and 501; Laws 1889, chaps. 193, 353 and 463, and Laws 1890, chap. 522; Laws 1894, chap. 592.)

Section 1 of the Corporation Tax Law makes it the duty of the president or treasurer of every corporation liable to be taxed *on its corporate franchises or business*, to make a report in writing to the Comptroller annually, on or before the 15th day of November, stating the amount of capital paid in, the date, amount and rate per centum of dividends declared. In case no dividends are declared, or the same are less than six per centum upon the par value of the stock, a sworn appraisal of the actual value of the stock is to be forwarded to the Comptroller, who, however, if not satisfied with the valuation returned, is authorized to make his own valuation, and to settle an account upon the valuation so made by him.

Section 2 of the act provides that in case of a failure to make the report required by the statute, or to pay the tax imposed by the Comptroller, it shall be his duty to add a ten per centum penalty to the tax of said corporation.

Section 3 of the act reads as follows: "Every corporation, joint stock company, or association whatever, "now or hereafter incorporated, organized, or formed "under, by, or pursuant to law in this State, or

"in any other State or country, and doing busi-
"ness in this State, except only savings banks and insti-
"tutions for savings, life insurance companies, banks, for-
"eign insurance companies, manufacturing or mining
"companies, or companies wholly engaged in carrying on
"manufacturing, or mining ores within this State, and
"agricultural and horticultural societies, associations or
"corporations, which exceptions, however, shall not in-
"clude gas companies, trust companies, electric and steam
"heating, lighting and power companies, shall be liable
"to and shall pay a tax, as a tax upon its franchise or
"business, into the State treasury annually, to be com-
"puted as follows: If the dividend, or dividends, made or
"declared by such corporation, joint-stock company or
"association, during any year ending with the first day
"of November, amount to six or more than six per centum
"upon the par value of its capital stock, then the tax to
"be at the rate of one-quarter mill upon the capital stock
"for each one per centum of dividends so made or de-
"clared; or, if no dividend be made or declared, or if the
"dividend or dividends made or declared do not amount
"to six per centum upon the par value of said capital
"stock, then the tax to be at the rate of one and one-half
"mills upon each dollar of the valuation of the said
"capital stock, made in accordance with the provisions
"of the first section of this act; and in case any such cor-
"poration, joint-stock company or association, shall have
"more than one kind of capital stock, as, for instance,
"common and preferred stock, and upon one of said stocks
"a dividend or dividends amounting to six or more than
"six per centum upon the par value thereof has been

made or declared, and upon the other no dividend has "been made or declared, or the dividend or dividends "made or declared thereon amount to less than "six per centum upon the par value thereof, then "the tax shall be at the rate of one-quarter mill for "each one per centum of dividends made or declared "upon the capital stock upon the par value of which the "dividend or dividends made or declared amount to six "or more than six per centum, and in addition thereto "tax shall be charged at the rate of one and one-half "mills upon each dollar of a valuation, made also in ac- "cordance with the provisions of this act, of the capital "stock upon which no dividend was made or declared, "or upon the par value of which the dividend or divi "dends made or declared did not amount to six per "centum."

Section 11, as far as applicable, reads as follows:

"*The amount of capital stock* which shall be the basis "for tax under the provisions of section three of this act, "in the case of every corporation, joint-stock company "and association liable to taxation thereunder, shall be "the *amount of capital stock employed within this State.* "In making to the Comptroller the report in writing or "certificate of estimate and appraisal of the capital stock "of such corporation, joint stock company or association, "provided for by the first section of this act, it shall be "the duty of the president or treasurer thereof, as the "case may be, to state, specifically, the amount of capital "stock employed within this State of such corporation, "joint-stock company or association. Whenever the "Comptroller is dissatisfied with such report or certificate

"of estimate and appraisal, as the case may be, of any "corporation, joint stock company or association, whose "capital is only partially employed within this State, he "is authorized and empowered to ascertain, fix and de- "termine the *amount of capital* employed within this "State, and so settle an account for the taxes and pen- "alties due the State thereon."

Section 19 of the act authorizes the Comptroller to re-adjust the taxes imposed, upon application of the corporation.

Section 20 of the act provides for a review of the law and the facts as found by the Comptroller, by writ of *certiorari*.

POINTS.

I.

The tax, although upon the franchise or business of a corporation, is measured by the amount of capital employed in the State.

This appears clearly from the phraseology of the statute itself. (§ 3.) The statute was amended by chapter 501, Laws of 1885, so as to make it more favorable to corporations only doing a part of their business in the State of New York. Under the act of 1882 (chap. 151, § 11) it was left with the Comptroller to determine "the amount of capital stock which in his judgment shall be the basis of the tax." By the amendment the basis of the tax is "the amount of capital stock employed in this State."

The Corporation Tax Law of New York was very thoroughly reviewed in the case of Horn Silver Mining Company v. New York State, 143 U. S. 305. The views of the court are summarized in the head-note as follows: "The statute of New York of May 26, 1881 (Laws of "1881, chap. 361) imposing a tax upon the corporate "franchise or powers of every corporation, joint-stock "company or association incorporated or organized under "any law of the State or of any other State or country, "to be computed by a percentage upon its whole capital "stock, and to be ascertained in the manner provided by "the act, when applied to a manufacturing corporation "organized under the Laws of Utah, and doing the greater "part of its business out of the State of New York, and pay- "ing taxes in Illinois and Utah, but doing a small part "of its business in the State of New York, does not "tax persons or property not within the State; nor regu "late interstate commerce; nor take private property "without just compensation; nor deny to the corpora- "tion the equal protection of the laws; nor impose a tax "beyond the constitutional power of the State; and the "remedy of the corporation against hardship and in- "justice, if any has been suffered, must be sought in the "Legislature of the State."

After a discussion of the statute, the court concludes at the close of the opinion (p. 318): "The tax is not "levied upon articles imported, nor is there any impedi- "ment to their importation. The products of the mine "can be brought into the State and sold here without tax- "ation, and they can be exhibited there for sale in any "office or building obtained for that purpose; the tax is

"levied only upon the franchise or business of the Com-
"pany."

See also Home Ins. Co. v. New York,
119 U. S. 129.

The nature and purpose of the law is clearly defined in People ex rel. A. C. & D. Co. v. Wemple, 129 N. Y. 558. In the course of its opinion the court says: "As "to corporations created under the laws of this State, "the power to tax their franchises and business is un-"doubted and general; but as to corporations, which are "created under the laws of another State or country, juris-"diction for taxing purposes is gained from the business "which they do in this State and the tax is one upon that "business. Foreign corporations coming into this State, "for the purpose of doing some part of their corporate "business here, are placed under the obligation to bear "some portion of the general burden of taxation, in "return for the privileges and benefits enjoyed. The "words of this section, which we are considering, may be "said to be the recognition by the Legislature of the limi-"tation upon its powers, or upon the right to levy taxes, "with respect to foreign corporations. Taxation under "the act as to such is limited to those 'doing business in "this State' and the tax is assessed upon that business."

* * * * * * * *

The rule that taxation is measured by the amount of capital employed in this State has been repeatedly stated by the courts of the State of New York.

Thus, in the case of People ex rel. S. T. C. Co. v. Wemple, 133 N. Y. 323, the court says in the head-note: "The basis of taxation of a foreign corporation under "said act is the portion of its capital employed within the

"State; this is represented by the actual value of prop-
"erty, whether in money or goods, or other tangible
"things."

At page 328 O'Brien, Judge, says: "Only such part
"of it (the capital) was employed within this State as
"was represented by the actual value of property,
"whether in money, goods or other tangible things. It
"kept goods for sale here. It had money on deposit, and
"it may be other property. This, whatever its value, was
"the basis of taxation."

See also People ex rel. Roebling's Sons Company v. Wemple, 138 N. Y. 582

II.

The statute is not an infringement of the interstate commerce clause of the Federal Constitution.

"The Congress shall have power * * * 3, to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." (Art. 1, § 8.)

The tax is uniform, applying in the same degree and to the same extent to domestic and foreign corporations, except as to foreign corporations they must not only have capital employed in this State, but must be *doing business in this State.* (§ 3.)

People ex rel. A. C. & D. Co. v. Wemple, 129 N. Y. 558.

As to corporations whose capital is only partially employed in the State, the Comptroller is to determine the amount of capital employed in the State. (§ 11.)

Section 3 reads: "§ 3. Every corporation, joint-stock
"company, or association whatever, now or hereafter in-

"corporated, organized, or formed under, by, or pursuant "to law in this State, or in any other State or country, "and doing business in this State, * * * shall be lia- "ble to and shall pay a tax, as a tax upon its franchise or "business, into the State treasury annually."

Section 11 provides: "§ 11. The amount of capital stock "which shall be the basis for tax under the provisions of "section three of this act, in the case of every corpora- "tion, joint-stock company and association liable to taxa- "tion thereunder, shall be the amount of capital stock "employed within this State. * * * Whenever the "Comptroller is dissatisfied with such report or certificate "of estimate and appraisal, as the case may be, of any "corporation, joint-stock company or association, whose "capital is only partially employed within this State "he is authorized and empowered to ascertain, fix and "determine the amount of capital employed within this "State, and so settle an account for the taxes and penal- "ties due the State thereon."

A. The tax is in no sense a regulation of interstate commerce, and does not come within the principles of any of the decided cases relative to that constitutional provision.

It was held in the case of Woodruff v. Parham, 8 Wall. 123, that a uniform tax imposed by a State upon all sales made in it, whether made by a citizen of it or a citizen of some other State, or whether the goods sold are the produce of that State, or some other State, is valid.

The opinion in that case contains these words (p. 136): "Whether we look, then, to the terms of the clause of the "Constitution in question, or to its relation to the other "parts of that instrument, or to the history of its forma-

"tion and adoption, or to the comments of the eminent "men who took part in those transactions, we are forced "to the conclusion that no intention existed to prohibit, "by *this clause*, the right of one State to tax articles "brought into it from another. If we examine for a "moment the results of an opposite doctrine, we shall be "well satisfied with the wisdom of the Constitution as "thus construed The merchant of Chicago who buys "his goods in New York and sells at wholesale in the "original packages may have his millions employed in "trade for half a lifetime and escape all State, county "and city taxes; for all that he is worth is invested in "goods which he claims to be protected as imports from "New York. Neither the State nor the city which pro- "tects his life and property can make him contribute a "dollar to support its government, improve its thorough- "fares or educate its children. The merchant in a town "in Massachusetts, who deals only in wholesale, if he "purchases his goods in New York, is exempt from taxa- "tion. If his neighbor purchase in Boston, he must pay "all the taxes which Massachusetts levies with equal jus- "tice on the property of all its citizens. These cases are "merely mentioned as illustrations. But it is obvious "that if articles brought from one State into another are "exempt from taxation, * * * the grossest injus- "tice must prevail, and equality of public burdens in "all our large cities is impossible."

Woodruff v. Parham, 75 U. S. (8 Wall.) 136-7.

As hereinbefore stated the measure or basis of the tax is the amount of capital employed in the State of New

York, and this tax is imposed without any effort or attempt to interfere with interstate commerce.

As was stated by Chief Justice Fuller in the case of Postal Telegraph Company v. Adams, 155 U. S. 688-695;

"It is settled that where by way of duties laid on the "transportation of the subjects of interstate commerce, "or on the receipts derived therefrom, or on the occupa- "tion or business of carrying it on, a tax is levied by a "State on interstate commerce, such taxation amounts to "a regulation of such commerce, and can not be sustained. "But property in a State belonging to a corporation, "whether foreign or domestic, engaged in foreign or in- "terstate commerce, may be taxed, or a tax may be im- "posed on the corporation on account of its property "within a State, and may take the form of a tax for the "privilege of exercising its franchises within the State, "if the ascertainment of the amount is made dependent "in fact on the value of its property situated within the "State (the exaction, therefore, not being susceptible of "exceeding the sum which might be leviable directly "thereon), and if payment be not made a condition "precedent to the right to carry on the business, but its "enforcement left to the ordinary means devised for the "collection of taxes. The corporation is thus made to "bear its proper proportion of the burdens of the gov- "ernment under whose protection it conducts its opera- "tions, while interstate commerce is not in itself sub- "jected to restraint or impediment. As pointed out by "Mr. Justice Field, in Horn Silver Mining Company v. "New York, 143 U. S. 305, the right of a State "to tax the franchise or privilege of being a corporation,

"as personal property, has been repeatedly recognized by "this court, and this whether the corporation be a domestic, "or a foreign corporation doing business by its permission "within the State. But a State can not exclude from "its limits a corporation engaged in interstate or foreign "commerce, or a corporation in the employment of the "general government, either directly in terms or indi- "rectly by the imposition of inadmissible conditions. "Nevertheless the State may subject it to such property "taxation as only incidentally affects its occupation, as "all business, whether of individuals or corporations, is "affected by common governmental burdens. (Ashley v. "Ryan, 153 U. S. 436, and cases cited.")

B. This particular corporation is not, as a matter of fact, or within the constitutional meaning, engaged in interstate commerce. Although a manufacturing corporation under the laws of the State of Michigan, as far as the State of New York is concerned it is simply a business corporation doing a large business and employing capital in that State. It is, to all intents and purposes, a wholesale merchant doing business in New York city, and no more entitled to exemption than any other wholesale dealer in dry goods, groceries, drugs or what not, who imports goods from Europe, brings them into the New York market, or brings them there from other States, and sells as the customers present themselves. Its store is at 92-94 Maiden lane, rented for twelve thousand five hundred ($12,500) dollars per annum; average amount of stock on hand, fifty thousand ($50,000) dollars; average imported crude drugs, fifty thousand ($50,000) dollars; office furniture and fixtures, fifteen thousand ($15,000)

dollars; monthly bank balance, ten thousand ($10,000) dollars; expense account for year 1894, one hundred and seventy-five thousand ($175,000) dollars. (Pages 12 and 13.) It buys and sells crude drugs in the New York market averaging forty thousand dollars ($40,000) per annum. (Pages 15 and 21.) Its store is seventy four feet front, with fifty employes and a manager, hired at the rate of eight thousand ($8,000) dollars per year. (Page 88.) With the same reasons urged by the plaintiff in error, exemption from taxation, both under the General and Corporation Tax Law, might be claimed by all the wholesale dealers of the State. It is to be observed that the Comptroller carefully excluded from his computation all crude drugs imported from Europe. Although there could be no legal objection to imposing even a direct tax upon these importations after they had "become articles of internal trade, and for domestic use and consumption." (Brown v. Maryland, 12 Wheaton, 419–455.) As far as the property is concerned that was considered by the Comptroller for the purpose of determining the amount of capital employed in the State of New York, *it had its situs in New York and had become incorporated with the property of that State.* The business of this corporation is not strictly commerce, interstate or foreign.

Pembina Mining Co. v. Pennsylvania,
125 U. S. 181.
People ex rel. S. C. O. Co. v. Wemple,
131 N. Y. 64.

In the case of Southern Cotton Oil Co. v. Wemple, 44 Federal Reporter, 24, the company claimed to be a foreign manufacturing corporation, and that it delivered to

its purchasers the goods manufactured in the original unbroken packages. Wallace, J., in deciding the case, says (page 27):

"But a foreign corporation, which established a business domicile here, and brings its property within this "jurisdiction, and mingles it with the general mass of "commercial capital, is taxable here; and the power of "the State is ample to tax its property directly or to lay "a tax upon its privilege of doing business, whether "the property consists of funds deposited in bank or of "goods sent here from other States, not in transit merely, "but to remain here until used or sold. The principle of "the present statute is that such corporations shall contribute according to the value of their capital employed "within the State. It lays the tax upon the privilege, "and measures the amount by the amount of property "which is protected here Reasonably interpreted, the "statute means by doing business within this State "using this State as a business domicile for transacting "any substantial part, even though a comparatively small "part, of the business which the company is organized "to carry on, and in which its capital is embarked. "It would seem that a manufacturing company which "maintains an established location here, and an agent, "for the purpose of selling its products or facilitating "their sale, carries on a part of its ordinary business "here, and has a business domicile here; and if it keeps "funds here for maintaining its place of business, and to "enable it to carry on the operations of its agent, such a "foreign company would seem to be taxable under the "statute. Certainly it can not matter that the volume

"of business done is small, or that the location, instead "of being a warehouse or a shop, is an office or a "sample-room."

III.

The statute does not deny to the plaintiff in error equal protection of the laws, or deprive it of property without due process of law.

"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

Constitution, art. 4, § 2.

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the "United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution, art. 14, § 1.

(Speaking of the law then in force):

A. The Corporation Tax Law of New York is uniform in its terms and does not discriminate against foreign corporations. As far as the exemption relates to manufacturing corporations, it may be stated as follows:

1. The company must be incorporated solely for manufacturing purposes.

2. To claim absolute exemption, it must not only be incorporated solely for the purpose of doing manufacturing (and the business incident thereto) but must also be wholly engaged in that business in the State of New York.

3. If incorporated solely for manufacturing in so far as it does a manufacturing business in New York, it

is exempt from taxation, and only liable to be taxed on the business done *ultra vires*.

4. A corporation, *whether domestic or foreign*, can not claim exemption because of doing a manufacturing business outside of the State of New York.

People ex rel. Blackinton Co. v. Roberts, Fourth Appellate Division, Supreme Court, 388.
S. C., 151 N. Y. 652.
People ex rel. Tiffany & Co. v. Campbell, 144 N. Y. 166.
People ex rel. W. E. Co. v. Campbell, 145 N. Y. 587.
Horn Silver Mining Co. v. New York State, 143 U. S. 305.
Southern Cotton Oil Co. v. Wemple, 44 Federal Reporter, 24.

I have no doubt that when the case presents itself of a foreign corporation wholly engaged in manufacturing in the State of New York that it will be held exempt from taxation.

The statute has now been so amended as to exempt manufacturing corporations to the extent of the capital employed in manufacturing in that State, and in the sale of the manufactured product. (Laws 1896, chap. 908, sec. 183.)

The court says in the Blackington case: "The relator "in the case is a domestic corporation, organized for the "purpose of manufacturing woolens or textile fabrics. It "manufactures all its products at Blackington, in the State "of Massachusetts. * * * The relator's general "office, its sales, its bank account and the general "control and management of its business, are all "carried on in this State, but its manufacturing plant, "its employees in the business of manufacturing its

"goods, the work which they perform and the wages "paid to them are neither of them located or carried on "within this State. In other words, a large part of the "business is carried on within this State, but the entire "business of manufacturing its products is carried on in "another State. Within the literal reading of this sec- "tion it is clear that the relator is not exempt from the "franchise tax. Is it not engaged in carrying on manufac- "turing within this State? * * * It (the exemption) "is not given to all manufacturing corporations, nor even "to those who are engaged in carrying on business within "this State. But the manufacturing corporation must "also be engaged in carrying on manufacture within this "State."

People ex rel. Blackington v. Roberts, 4 App. Div. 388.

B. A State may discriminate in favor of domestic as against foreign corporations, and may require a franchise or business tax from the latter as a condition of being allowed to do business within this State.

Ducat v. Chicago, 10 Wall. 410.
Cooper Mfg. Co. v. Firguson et al., 113 U. S. 727.
Horn Silver Mining Co. v. New York, 143 U. S. 305.
Paul v. Virginia, 8 Wall. 168.
People v. Fire Ins. Co., 92 N. Y. 311.
Pembina Mining Co. v. Penn., 125 U. S. 189.
People v. Formosa, 131 N. Y. 478.
Demerest v. Flack, 128 N. Y. 205.
People v. Imlay, 20 Barb. 68.
Pembina Mining Co. v. Penn., 125 U. S. 181.
Paul v. Virginia, 75 U. S. (8 Wall.) 168.
Ashley v. Ryan, 153 U. S. 437.
Lafayette Ins. Co. v. French, 18 How. (U. S.) 404.

IV.

For the reasons hereinbefore suggested, and because the Supreme Court of the United States has already held that the Tax Law under consideration in no way contravenes the Constitution of the United States, the judgment of the State courts should be affirmed, and the plaintiffs' writ of error dismissed.

The Comptroller in determining the amount of capital employed in the State of New York, and imposing a tax, followed a well-established rule, which has received the sanction and approval of the courts of that State.

Our courts have repeatedly held that products manufactured in another state and sold in New York can properly be considered in estimating the amount of capital employed within that State.

People ex rel. S. C. O. Co. v. Wemple, 131 N. Y. 64.
People ex rel. Roebling Sons Co. v. Wemple, 138 N. Y. 582.
Southern Cotton Oil Co. v. Wemple, 44 Fed. Rep. 24.
People ex rel. S. T. C. Co., 133 N. Y. 323.

The Comptroller in determining the amount of capital employed in this State, had a right to take into consideration the bank account; the amount of moneys paid out; the actual value of its property, whether in money, goods kept for sale, or other tangible things; rentals, salaries or whatever might aid him in determining the amount of capital used by the corporation in the State.

People ex rel. R. S. Company v. Wemple, 138 N. Y. 582.

People ex rel. S. T. C. Co. v. Wemple, 133 N. Y. 323.
People ex rel. S. C. O. Co. v. Wemple, 131 N. Y. 64.
People ex rel. A. C. & D. Co. v. Wemple, 129 N. Y. 558.
People ex rel. U. T. Co. v. Coleman, 126 N. Y. 433.
People ex rel. U. V. C. Co. v. Roberts, 149 N. Y. 61.

It is manifest that no injustice has been done the plaintiff in error, either as to the amount or basis of the tax.

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Wm Henry Dennis
of counsel

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NEW YORK STATE *v.* ROBERTS.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 21. Argued April 20, 21, 1898. — Decided October 31, 1898.

The statutes of the State of New York, providing that "Every corporation, joint stock company or association whatever, now or hereafter incorporated, organized or formed under, by or pursuant to law in this State or in any other State or country and doing business in this State, except only saving banks and institutions for savings, life insurance companies, banks, foreign insurance companies, manufacturing or mining corporations or companies wholly engaged in carrying on manufacture or mining ores within this State, and agricultural and horticultural societies or associations, which exceptions, however, shall not include gas companies, trust companies, electric or steam heating, lighting and power companies, shall be liable to and shall pay a tax as a tax upon its franchise or business into the state treasury annually, to be computed as follows:" and that "The amount of capital stock which shall be the basis for tax . . . in the case of every corporation, joint stock company and association liable to taxation thereunder shall be the amount of capital stock

Statement of the Case.

employed within this State," as construed by the highest court of that State, are not repugnant to the Constitution of the United States.

It must be regarded as finally settled by frequent decisions of this court, that, subject to certain limitations as respects interstate and foreign commerce, a State may impose such conditions upon permitting a foreign corporation to do business within its limits as it may judge expedient; and that it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital used within the State.

PARKE, Davis & Company is the name of a corporation organized under the laws of the State of Michigan for the manufacture and sale of chemical and pharmaceutical preparations. The factory is situated in the city of Detroit. The corporation has a warehouse and depot in the city of New York, and there keeps on hand varying quantities of its manufactured products, which are there sold at wholesale in original packages. The concern is represented in New York by John Clay as manager, who is paid a salary. The business of selling the manufactured articles is carried on in all respects like the ordinary sales of consigned goods. Clay, in his own name, but for the use of the company, imports crude drugs from foreign countries at the port of New York. Such crude drugs are, in large part, sent to the Detroit factory for use, but some portions are sold in the original packages in the city of New York.

The corporation pays an annual rental for its place of business in New York of $12,500, employs there a force of over fifty persons, and expended for the New York branch annually, for the years 1890 to 1894, inclusive, from $102,000 to $172,000. The property owned in New York, in the way of business fixtures, is valued at $15,000; the average stock of goods sent from Michigan and carried in New York during those years was $50,000. It also employed in New York during that period a continuing capital, used in the purchase and sale of crude drugs, of from $23,000 to $62,000 per year.

Upon this state of facts the comptroller of New York imposed for 1894, and five previous years, an annual tax based upon the sum of $90,000 as "capital employed within the State."

Statement of the Case.

At the time of the imposition of this tax the provisions of the statute here drawn in question were as follows (sec. 3, chap. 542, Laws of 1880, as amended by Laws of 1881, chap. 361; Laws of 1885, chap. 359; Laws of 1889, chaps. 193 and 353):

"Every corporation, joint stock company or association whatever, now or hereafter incorporated, organized or formed under, by or pursuant to law in this State, or in any other State or country and doing business in this State, except only savings banks and institutions for savings, life insurance companies, banks, foreign insurance companies, manufacturing or mining corporations or companies wholly engaged in carrying on manufacture or mining ores within this State, and agricultural and horticultural societies or associations, which exceptions, however, shall not include gas companies, trust companies, electric or steam heating, lighting and power companies, shall be liable to and shall pay a tax as a tax upon its franchise or business into the state treasury annually, to be computed as follows."

Then come provisions grading the tax according to annual dividends. The tax originally fell upon the entire capital of a corporation, but the statute was amended in 1885 so as to read:

"The amount of capital stock which shall be the basis for tax under the provisions of section three (*supra*) in the case of every corporation, joint stock company and association liable to taxation thereunder, shall be the amount of capital stock employed within this State."

Parke, Davis & Company, through their said manager, filed a petition in the New York Supreme Court, praying for a writ of certiorari directed to the comptroller, in order to subject his assessment to correction. In the petition it was alleged that the only capital in any proper sense employed by the company within the State of New York in the sale of its products was its leasehold of the warehouse and the office furniture and fixtures, not exceeding in value $15,000; that said company, being a manufacturing corporation, was exempt from taxation under the laws of the State of New York; that the comptroller erred in deciding that goods manufactured

by said corporation and stored at its depot in New York are capital employed in said State within the meaning of the statute; that if said statute was correctly interpreted by the comptroller, then said statute was unconstitutional and void as in contravention of the Constitution of the United States and the amendments thereof.

To the certiorari granted upon said petition the comptroller duly made a return, alleging that his acts and proceedings were valid.

The cause was heard at the December term, 1895, of said court, and judgment was entered quashing the writ of certiorari, and confirming the comptroller's assessment. From that judgment an appeal was taken to the Court of Appeals of the State of New York, and on June 9, 1896, the cause was heard, the order and judgment of the Supreme Court were affirmed, and the record remitted to the Supreme Court. 91 Hun, 158; 149 N. Y. 608.

Whereupon the cause was brought to this court by a writ of error duly prayed for and allowed.

Mr. James McKeen for plaintiff in error.

Mr. T. E. Hancock, attorney general of the State of New York for defendant in error. *Mr. William Henry Dennis* was on his brief.

Mr. Justice Shiras, after stating the case, delivered the opinion of the court.

The construction put upon the statute of the State of New York by its courts is, of course, binding upon this court, and that portion of the contention which questioned the action of the comptroller on the ground of a misinterpretation of the law is thus disposed of.

It must be regarded as finally settled by frequent decisions of this court that, subject to certain limitations as respects interstate and foreign commerce, a State may impose such conditions upon permitting a foreign corporation to do business

within its limits as it may judge expedient; and that it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital used within the State. *Paul* v. *Virginia*, 8 Wall. 168; *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305.

Accordingly the counsel for the plaintiff in error disavows in his brief any wish to bring those decisions into further review, but his contention is that this Michigan corporation, having come within the jurisdiction of New York by compliance with all the provisions of law imposing conditions for transacting business within the State, is denied the equal protection of the law when subjected to a tax from which are exempted other corporations, foreign and domestic, which wholly manufacture the same class of goods within the State; that such a tax is an unjust discrimination against this corporation, whose place of manufacture is in the State of Michigan. By this contention it is not meant, of course, that this particular corporation is, in terms, discriminated against in the New York statute, but that all corporations which manufacture their goods wholly in other States and send them for sale in New York are discriminated against in favor of such corporations, whether foreign or domestic, as manufacture their goods within the State of New York.

To sustain this contention the well-known line of cases is cited, wherein this court has had to deal with state legislation imposing discriminating taxes against the products of other States. *Walling* v. *Michigan*, 116 U. S. 446; *Robbins* v. *Shelby County Taxing District* 120 U. S. 489; *Minnesota* v. *Barber*, 136 U. S. 313.

If the object of the law in question was to impose a tax upon products of other States, while exempting similar domestic goods from taxation, there might be room to contend that such a distinction was constitutionally objectionable as tending to affect or regulate commerce between the States. But we think that obviously such is not the purpose of this legislation. "Every corporation, joint stock company or association whatever, now or hereafter incorporated, organized or formed under, by or pursuant to law in this State or in any

other State or country and doing business in this State, . . . shall be liable to and shall pay a tax as a tax upon its franchise or business into the state treasury annually, to be computed as follows."

It will be perceived that the tax is prescribed as well for New York corporations as for those of other States. It is true that manufacturing or mining corporations wholly engaged in carrying on manufacture or mining ores within the State of New York are exempted from this tax; but such exemption is not restricted to New York corporations, but includes corporations of other States as well, when wholly engaged in manufacturing within the State.

In construing this statute it was held, in the case of *People ex rel. Blackinton Co.* v. *Roberts*, 4 Appellate Div. 388, that a New York corporation which carried on a manufacturing business in another State was liable to this tax; and this decision was affirmed by the New York Court of Appeals. 151 N. Y. 652.

The tax is graded according to annual dividends, and originally was assessed upon the entire capital of a corporation; but the statute was amended in 1885 so as to read: "The amount of capital stock which shall be the basis for tax under the provisions of section three, in the case of every corporation, joint stock company and association liable to taxation thereunder, shall be the amount of capital stock employed within this State."

So that it is apparent that there is no purpose disclosed in the statute either to distinguish between New York corporations and those of other States to the detriment of the latter, or to subject property out of the State to taxation.

In the present case, indeed, complaint is made of the action of the comptroller in determining the "amount of the capital stock employed within the State" — that the amount fixed by him was too large. The action of the comptroller was subject to revision, and the corporation's complaints in respect thereto were heard and passed upon by the Supreme Court of New York. The estimate of the comptroller, in determining the amount of capital employed in the State, would not be judi-

cially interfered with unless it was clearly shown that the same was erroneous; and, even then, such errors would not present a Federal question for our consideration.

Nor can we consider the further contention that portions of the business which were made the basis of the assessment were improperly treated as business of the corporation, whereas they should have been regarded as pertaining to the personal transactions of Mr. Clay, the company's agent. The true relation of Mr. Clay to the corporation's business was one of fact, in respect to which a hearing was afforded to the corporation, and this court is in no position to enter into such an inquiry.

Again, it is said that, even assuming that the importation of crude drugs and their sale in the original packages constituted a portion of the corporate business, no tax could be imposed by the State under the doctrine of *Brown* v. *Maryland*, 12 Wheat. 419.

But that case is inapplicable. Here no tax is sought to be imposed directly on imported articles or on their sale. This is a tax imposed on the business of a corporation, consisting in the storage and distribution of various kinds of goods, some products of their own manufacture and some imported articles. From the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested. *Society for Savings* v. *Coite*, 6 Wall. 594; *Provident Institution* v. *Massachusetts*, 6 Wall. 611; *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181; *Home Insurance Co.* v. *New York*, 134 U. S. 594.

When a corporation of one State, whose business is that of a common carrier, transacts part of that business in other States, difficult questions have arisen, and this court has been called upon to decide whether certain taxing laws of the respective States infringe upon the freedom of interstate commerce. It has been found difficult to prescribe a satisfactory rule whereby the public burdens of taxation can be justly apportioned between the business and agencies of such a corporation in different States, and the subject has been much

discussed in several recent cases. *Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S. 530; *Pittsburgh, Cincinnati, &c. Railway* v. *Backus*, 154 U. S. 421; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18; *Adams Express Co.* v. *Ohio*, 165 U. S. 194. It is not necessary in this case to enter into a subject so difficult, but the cases are referred to as showing the distinction between corporations organized to carry on interstate commerce, and having a quasi-public character, and corporations organized to conduct strictly private business.

The corporation concerned in the present litigation is of the latter character, and the case comes within the doctrine of *Paul* v. *Virginia*, 8 Wall. 168, and of subsequent cases affirming that one. *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305, may be specially mentioned, as it involved a similar question and the same statutes which are before us in the present case. The Horn Silver Mining Company was a corporation of the Territory of Utah, where it carried on a mining and manufacturing business. It also carried on business in the State of New York, and was there subjected to an annual tax upon its corporate franchise or business, as prescribed in the statute of the State of New York. The company refusing to pay the tax, proceedings to enforce its payment were resorted to, which resulted in the case being brought to this court, where some of the questions raised in the present case were considered and determined. The conclusions reached were that the law in question did not tax property not within the State; nor regulate interstate commerce; nor deny to the corporation the equal protection of the laws; nor impose a tax beyond the constitutional power of the State.

It is said that the operation of that portion of this taxing law which exempts from a business tax corporations which are wholly engaged in manufacturing within the State of New York, is to encourage manufacturing corporations which seek to do business in that State to bring their plants into New York. Such may be the tendency of the legislation, but so long as the privilege is not restricted to New York corpora-

tions, it is not perceived that thereby any ground is afforded to justify the intervention of the Federal courts.

The judgment of the Supreme Court of the State of New York is accordingly

Affirmed.

Mr. Justice Harlan, with whom concurred Mr. Justice Brown, dissenting.

It seems to me that the opinion and judgment in this case are not in harmony with former decisions of this court.

The comptroller of New York has imposed upon the plaintiff in error, a Michigan corporation doing business in New York, an annual tax for the year 1894 and the preceding five years, upon the sum of $90,000 "as capital employed" in the latter State. The authority for this tax was found in a statute of New York providing that "every corporation, joint stock company, or association whatever, now or hereafter incorporated, organized or formed under, by or pursuant to law in this State or in any other State or country, and doing business in this State, except only savings banks and institutions for savings, life insurance companies, banks, foreign insurance companies, manufacturing or mining corporations or companies wholly engaged in carrying on manufactures or mining ores within this State, and agricultural and horticultural societies or associations, which exceptions, however, shall not include gas companies, trust companies, electric or steam heating, lighting and power companies, shall be liable to and shall pay a tax, as a tax upon its franchise or business, into the state treasury annually, to be computed as follows," etc. Laws of N. Y., 1889, June 4, c. 353, p. 467.

The goods sold by the plaintiff in error, by its agents in New York, are manufactured in the State of Michigan. If the plaintiff had been wholly engaged in carrying on manufacture in New York it would have been exempted by the statute from the taxes in question.

So that the question in this case is, whether it is competent for New York to impose a tax upon the franchise or business

of manufacturing corporations or companies, foreign or domestic, not "wholly engaged" in carrying on manufacture within its limits, while at the same time it exempts from such taxation like corporations or companies wholly engaged in carrying on manufactures in that State.

Is not such legislation an injurious discrimination against the manufacturing business and the manufactured goods of other States, in favor of the manufacturing business and the manufactured goods of New York, which is forbidden by the Constitution of the United States? Let us see. The question presented for consideration is of such importance as to justify an extended reference to our former decisions.

In *Woodruff* v. *Parham*, 8 Wall. 123, 140, it was contended that a provision in the charter of the city of Mobile, Alabama, authorizing the collection of a tax on sales at auction, was invalid in its application to auctioneers who sold in that State in the original packages goods and merchandise the product of States other than Alabama. This court said: "The case before us is a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama or of another State, and whether the goods sold are the produce of that State or of some other. There is no attempt to discriminate injuriously against the products of other States or the rights of their citizens, and the case is not therefore an attempt to fetter commerce among the States, or to deprive the citizens of other States of any privilege or immunity possessed by citizens of Alabama. But a law having such operation would, in our opinion, be an infringement of the provisions of the Constitution which relate to those subjects, and therefore void."

At the same term of the court *Hinson* v. *Lott*, 8 Wall. 148, 150, 151, 152, was decided. That case involved the validity of a statute of Alabama declaring that "before it shall be lawful for any dealer or dealers in spirituous liquors to offer any such liquors for sale within the limits of this State, such dealer or dealers introducing any such liquors into the State for sale shall first pay the tax collector of the county into which such liquors are introduced, a tax of fifty cents per

gallon upon each and every gallon thereof." This court said: "If this section [the one just quoted] stood alone in the legislation of Alabama on the subject of taxing liquors, the effect of it would be that all such liquors brought into the State from other States and offered for sale, whether in the original casks by which they came into the State, or by retail in smaller quantities, would be subject to a heavy tax, while the same class of liquors manufactured in the State would escape the tax. It is obvious that the right to impose any such discriminating tax, if it exist at all, cannot be limited in amount, and that a tax under the same authority can as readily be laid which would amount to an absolute prohibition to sell liquors introduced from without, while the privilege would remain unobstructed in regard to articles made in the State. If this can be done in reference to liquors, it can be done with reference to all the products of a sister State, and *in this mode one State can establish a complete system of non-intercourse in her commercial relations with all the other States of the Union.*" Again: "But while the case has been argued here with a principal reference to the supposed prohibition against taxing imports, it is to be seen from the opinion of the Supreme Court of Alabama delivered in this case, that the clause of the Constitution which gives to Congress the right to regulate commerce among the States was supposed to present a serious objection to the validity of the Alabama statute. Nor can it be doubted that a tax which so seriously affects the interchange of commodities between the States as to essentially impede or seriously interfere with it, is a regulation of commerce. And it is also true, as conceded in that opinion, that Congress has the same right to regulate commerce among the States that it has to regulate commerce with foreign nations, and that whenever it exercises that power all conflicting state laws must give way, and that if Congress had made any regulation covering the matter in question we need inquire no further. That court seems to have relieved itself of the objection by holding that the tax imposed by the State of Alabama was an exercise of the concurrent right of regulating commerce remaining with the State until some regulation on the subject had been made

by Congress. But, assuming the tax to be, as we have supposed, a discriminating tax, levied exclusively upon the products of sister States, and looking to the consequences which the exercise of this power may produce if it be once conceded, amounting, as we have seen, to a total abolition of all commercial intercourse between the States, under the cloak of the taxing power, we are not prepared to admit that a State can exercise such a power, though Congress may have failed to act on the subject in any manner whatever." Referring to the doctrine announced in *Cooley* v. *Philadelphia Port Wardens*, 12 How. 299, that there is a class of legislation of a general nature affecting the commercial interests of all the States, which, from its essential character, is national, and which must, so far as it affects these interests, belong exclusively to the Federal Government, the court said: "The tax in the case before us, if it were of the character we have suggested, discriminating adversely to the products of all the other States, in favor of those of Alabama, and involving a principle which might lead to actual commercial non-intercourse, would, in our opinion, belong to that class of legislation, and be forbidden by the clause of the Constitution just mentioned." Upon examining the entire revenue statute of Alabama it was found that it did not injuriously discriminate against the products of other States, and the court said: "As the effect of the act is such as we have described, and it institutes no legislation which discriminates against the people of sister States, but merely subjects them to the same rate of taxation which similar articles pay that are manufactured within the State, we do not see in it an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the States."

In *Ward* v. *Maryland*, 12 Wall. 418, 429, the court held to be unconstitutional a statute of Maryland, making it a penal offence for any person, "not being a permanent resident" of that State, to sell, offer or expose for sale, within the city of Baltimore, any goods, wares or merchandise whatever, other than agricultural products and articles manufactured in the State of Maryland, without first obtaining a license so to do

—such license being fixed at $300 per year, while the license fees or taxes required of resident traders were from $15 to $150. The statute was adjudged to be void, because it discriminated against the people and products of other States. After referring to some of the former decisions, this court said: "Taxes, it is conceded in those cases, may be imposed by a State on all sales made within the State, whether the goods sold were the produce of the State imposing the tax, or of some other State, provided the tax imposed is uniform; but the court at the same time decides in both cases that a tax discriminating against the commodities of the citizens of the other States of the Union would be inconsistent with the provisions of the Federal Constitution, and that the law imposing such a tax would be unconstitutional and invalid. Such an exaction, called by what name it may be, is a tax upon the goods or commodities sold, as the seller must add to the price to compensate for the sum charged for the license, which must be paid by the consumer or by the seller himself; and in either event the amount charged is equivalent to a direct tax upon the goods or commodities. Imposed as the exaction is upon persons not permanent residents in the State, it is not possible to deny that the tax is discriminating with any hope that the proposition could be sustained by the court."

In *Welton* v. *Missouri*, 91 U. S. 275, 279, 281, the question was as to the validity of a statute of Missouri declaring that whoever should deal in the selling of patent and other medicines, goods, wares and merchandise, except books, charts, maps and stationery, which were "not the growth, produce or manufacture of this State," by going from place to place to sell the same, should be deemed a pedler, and prohibiting him, under a penalty, from dealing as such without first obtaining a license, no license being required for selling, "by going from place to place," the produce or manufacture of the State. The constitutionality of that statute was sought to be maintained upon the ground that it was only a tax upon a calling. The state court took that view of the statute, and observed that it was a calling limited to

the sale of merchandise not the growth or product of Missouri. But this court, after referring to *Brown* v. *Maryland*, 12 Wheat. 419, 444, as holding an act of Maryland to be in conflict with the Constitution of the United States because it imposed a license tax upon the importer of foreign goods, said: "So, in like manner, the license tax exacted by the State of Missouri from dealers in goods which are not the product or manufacture of the State, before they can be sold from place to place within the State, must be regarded *as a tax upon such goods themselves;* and the question presented is, whether legislation thus discriminating against the products of other States in the conditions of their sale by a certain class of dealers is valid under the Constitution of the United States." The question thus presented was solved by the judgment of this court declaring the legislation of Missouri to be unconstitutional. It was further said: "If Missouri can require a license tax for the sale by travelling dealers of goods which are the growth, product or manufacture of other States or countries, it may require such license tax as a condition of their sale from ordinary merchants, and the amount of the tax will be a matter resting exclusively in its discretion. The power of the State to exact a license tax of any amount being admitted, no authority would remain in the United States or in this court to control its action, however unreasonable or oppressive. Imposts operating as an absolute exclusion of the goods would be possible, and all the evils of discriminating state legislation, favorable to the interests of one State and injurious to the interests of other States and countries, which existed previous to the adoption of the Constitution, might follow, and the experience of the last fifteen years shows would follow, from the action of some of the States."

The case of *Guy* v. *Baltimore*, 100 U. S. 434, 439, 443, is much in point. That case involved the validity of certain ordinances of the mayor and council of Baltimore based upon an act of the General Assembly of Maryland authorizing the mayor and city council of Baltimore to regulate, establish, charge and collect, to the use of the said mayor and city council, such rate of wharfage as they deemed reasonable, "of and from all

vessels resorting to or lying at, landing, depositing or transporting goods or articles *other than the productions of this State*, on any wharf or wharves belonging to said mayor and city council, or any public wharf in the said city, other than the wharves belonging to or rented by the State."

This court, after referring to the previous cases of *Woodruff* v. *Parham*, *Hinson* v. *Lott* and *Ward* v. *Maryland*, said: "In view of these and other decisions of this court, it must be regarded as settled that no State can, consistently with the Federal Constitution, impose upon the products of other States, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory. If this were not so, it is easy to perceive how the power of Congress to regulate commerce with foreign nations and among the several States could be practically annulled, and the equality of commercial privileges secured by the Federal Constitution to citizens of the several States be materially abridged and impaired."

In the argument of that case it was contended that the city, by virtue of its ownership of the wharves in question, had the right, in its discretion, to permit their free use to all vessels landing at them with the products of Maryland; and that those operating vessels laden with the products of other States, cannot justly complain, so long as they are not required to pay wharfage fees in excess of reasonable compensation for the use of the city's property. The court said: "This proposition, however ingenious or plausible, is unsound both upon principle and authority. The municipal corporation of Baltimore was created by the State of Maryland to promote the public interests and the public convenience. The wharf at which appellant landed his vessel was long ago dedicated to public use. The public for whose benefit it was acquired, or who are entitled to participate in its use, are not alone those who may engage in the transportation to the port of Baltimore of the products of Maryland. It embraces, necessarily, all engaged in trade and commerce upon the public navigable

waters of the United States. Every vessel employed in such trade and commerce may traverse those waters without let or hindrance from local or state authority; and the national Constitution secures to all so employed, without reference to the residence or citizenship of the owners, the privilege of landing at the port of Baltimore with any cargo whatever, not excluded therefrom by or under the authority of some statute in Maryland enacted in the exertion of its police powers. The State, it will be admitted, could not lawfully impose upon such cargo any direct public burden or tax because it may consist, in whole or in part, of the products of other States. The concession of such a power to the States would render wholly nugatory all national control of commerce among the States, and place the trade and business of the country at the mercy of local regulations, having for their object to secure exclusive benefits to the citizens and products of particular States. But it is claimed that a State may empower one of its political agencies, a mere municipal corporation representing a portion of its civil power, to burden interstate commerce by exacting from those transporting to its wharves the products of other States wharfage fees which it does not exact from those bringing to the same wharves the products of Maryland. The city can no more do this than it or the State could discriminate against the citizens and products of other States in the use of the public streets or other public highways. . . . Municipal corporations owning wharves upon the public navigable waters of the United States, and quasi-public corporations transporting the products of the country, cannot be permitted by discriminations of that character to impede commercial intercourse and traffic among the several States and with foreign nations. In the exercise of its police powers a State may exclude from its territory or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to the health or would endanger the lives or property of its people. But if the State, under the guise of exerting its police powers, should make such exclusion or prohibition applicable solely to articles of that kind that may be produced or manufactured in other

States, the courts would find no difficulty in holding such legislation to be in conflict with the Constitution of the United States."

In *Machine Co.* v. *Gage*, 100 U. S. 676, 679, a statute of Tennessee imposing a license tax upon all pedlers of sewing machines was sustained, as not in violation of the Federal Constitution, because it applied "alike to sewing machines manufactured in the State and out of it." This court said: "In all cases of this class to which the one before us belongs, it is a test question whether there is any discrimination in favor of the State or of the citizens of the State which enacted the law. Wherever there is such discrimination it is fatal. Other considerations may lead to the same result. In the case before us, the statute in question, as construed by the Supreme Court of the State, makes no such discrimination. It applies alike to sewing machines manufactured in the State and out of it. The exaction is not an unusual or unreasonable one. The State, putting all such machines upon the same footing with respect to the tax complained of, had an unquestionable right to impose the burden. *Woodruff* v. *Parham*, *Hinson* v. *Lott*, *Ward* v. *Maryland*, *Welton* v. *Missouri*, *supra*."

Webber v. *Virginia*, 103 U. S. 344, 350, is also very much in point. That case involved the validity of a statute of Virginia providing that "any person who shall sell, or offer for sale, the manufactured articles or machines of other States or Territories, unless he be the owner thereof and taxed as a merchant, or take orders therefor, on commission or otherwise, shall be deemed to be an agent for the sale of manufactured articles of other States and Territories, and should not act as such without taking out a license therefor. No such person shall, under his license as such, sell or offer to sell such articles through the agency of another; but a separate license shall be required from an agent or employé who may sell or offer to sell such articles for another. For any violation of this section, the person offending shall pay a fine of not less than fifty dollars nor more than one hundred dollars for each offence. The specific license tax upon an agent for the sale of any manufactured article or machine of other States or

Territories shall be twenty-five dollars; and this tax shall give to any party licensed under this section the right to sell the same within the county or corporation in which he shall take out his license; and if he shall sell or offer to sell the same in any other of the counties or corporations of this State, he shall pay an additional tax of ten dollars in each of the counties or corporations where he may sell or offer to sell the same. All persons *other than resident manufacturers or their agents, selling articles manufactured in this State*, shall pay the specific license tax imposed by this section." §§ 45, 46.

This court said: "By these sections, read together, we have this result: the agent for the sale of articles manufactured in other States must first obtain a license to sell, for which he is required to pay a specific tax for each county in which he sells or offers to sell them; while the agent for the sale of articles manufactured in the State, if acting for the manufacturer, is not required to obtain a license or pay any license tax. Here there is a clear discrimination in favor of home manufacturers and against the manufacturers of other States. Sales by manufacturers are chiefly effected through agents. A tax upon their agents when thus engaged is, therefore, a tax upon them, and if this is made to depend upon the foreign character of the articles, that is, upon their having been manufactured without the State, it is to that extent a regulation of commerce in the articles between the States. It matters not whether the tax be laid directly upon the articles sold or in the form of licenses for their sale. If by reason of their foreign character the State can impose a tax upon them or upon the person through whom the sales are effected, the amount of the tax will be a matter resting in her discretion. She may place the tax at so high a figure as to exclude the introduction of the foreign article and prevent competition with the home product. It was against legislation of this discriminating kind that the framers of the Constitution intended to guard when they vested in Congress the power to regulate commerce among the several States."

In *Walling* v. *Michigan*, 116 U. S. 446, 459, 461, the principal

question was as to the validity of certain legislation in Michigan which, it was contended, discriminated against the manufactured products of other States. This court held the Michigan statute to be invalid, saying: "It is suggested by the learned judge who delivered the opinion of the Supreme Court of Michigan in this case, that the tax imposed by the act of 1875 is an exercise by the legislature of Michigan of the police power of the State for the discouragement of the use of intoxicating liquors, and the preservation of the health and morals of the people. This would be a perfect justification of the act, if it did not discriminate against the citizens and products of other States in a matter of commerce between the States, and thus usurp one of the prerogatives of the national legislature. The police power cannot be set up to control the inhibitions of the Federal Constitution, or the powers of the United States Government created thereby. *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650. . . . Another argument used by the Supreme Court of Michigan in favor of the validity of the tax is, that it is merely a tax on an occupation, which, it is averred, the State has an undoubted right to impose, and reference is made to *Brown* v. *Maryland*, 12 Wheat. 419, 444; *Nathan* v. *Louisiana*, 8 How. 73, 80; *Pierce* v. *New Hampshire*, 5 How. 593; *Hinson* v. *Lott*, 8 Wall. 148; *Machine Co.* v. *Gage*, 100 U. S. 676. *None of these cases, however, sustain the doctrine that an occupation can be taxed if the tax is so specialized as to operate as a discriminative burden against the introduction and sale of the products of another State, or against the citizens of another State.*"

In *Brimmer* v. *Rebman*, 138 U. S. 78, 81, 83, the question was as to the validity of a statute relating to the sale of meats in Virginia. This court said: "The recital in the preamble that unwholesome meats were being offered for sale in Virginia cannot exclude the question of the conformity of the act to the Constitution. . . . Is the statute now before us liable to the objection that, by its necessary operation, it interferes with the enjoyment of rights granted or secured by the Constitution? This question admits of but one answer. The statute is, in effect, a prohibition upon the sale in Virginia

of beef, veal or mutton, although entirely wholesome, if from animals slaughtered one hundred miles or over from the place of sale. We say prohibition, because the owner of such meats cannot sell them in Virginia until they are inspected there; and being required to pay the heavy charge of one cent per pound to the inspector, as his compensation, he cannot compete, upon equal terms, in the markets of that Commonwealth, with those in the same business whose meats, of like kind, from animals slaughtered within less than one hundred miles from the place of sale, are not subjected to inspection at all. Whether there shall be inspection or not, and whether the seller shall compensate the inspector or not, *is thus made to depend entirely upon the place where the animals from which the beef, veal or mutton is taken, were slaughtered.* Undoubtedly, a State may establish regulations for the protection of its people against the sale of unwholesome meats, provided such regulations do not conflict with the powers conferred by the Constitution upon Congress, or infringe rights granted or secured by that instrument. But it may not, under the guise of exerting its police powers, or of enacting inspection laws, *make discriminations against the products and industries of some of the States in favor of the products and industries of its own or other States.* The owner of the meats here in question, although they were from animals slaughtered in Illinois, had the right, under the Constitution, to compete in the markets of Virginia upon terms of equality with the owners of like meats, from animals slaughtered in Virginia or elsewhere within one hundred miles from the place of sale. Any local regulation which, in terms or by its necessary operation, denies this equality in the markets of a State is, when applied to the people and products or industries of other States, a direct burden upon commerce among the States, and, therefore, void. *Welton* v. *Missouri*, 91 U. S. 275, 281; *Railroad Co.* v. *Husen*, 95 U. S. 465; *Minnesota* v. *Barber*, above cited. The fees exacted, under the Virginia statute, for the inspection of beef, veal and mutton, the product of animals slaughtered one hundred miles or more from the place of sale, are, in reality, a tax; and, 'a discriminating tax imposed by a

State, operating to the disadvantage of the product of other States when introduced into the first-mentioned State, is, in effect, a regulation in restraint of commerce among the States, and, as such, is a usurpation of the powers conferred by the Constitution upon the Congress of the United States.' *Walling* v. *Michigan*, 116 U. S. 446, 455. Nor can this statute be brought into harmony with the Constitution by the circumstance that it purports to apply alike to the citizens of all the States, including Virginia; for, 'a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute.' *Minnesota* v. *Barber*, above cited; *Robbins* v. *Shelby Taxing District*, 120 U. S. 487, 489. If the object of Virginia had been to obstruct the bringing into that State, for use as human food, of all beef, veal and mutton, however wholesome, from animals slaughtered in distant States, that object will be accomplished if the statute before us be enforced."

In *Emert* v. *Missouri*, 156 U. S. 296, 311, a Missouri statute, requiring the payment of a license tax by pedlers, was held to apply to the sale by pedlers in Missouri of sewing machines made in other States, and not to be a regulation of interstate commerce. The decision was placed upon the ground that the statute made no discrimination against the goods of other States as compared with domestic goods.

I am unable to reconcile the opinion and judgment in the present case with the principles announced in the above cases. A tax upon the capital employed by a manufacturing corporation or company is *pro tanto* a tax upon the goods manufactured by it. If this be not so, there are many expressions in the former opinions of this court which should be withdrawn or modified. A corporation or company wholly engaged in manufacture in New York has an advantage, in the sale of its goods in the markets of that State, over a corporation or company manufacturing like goods in other States, if the former is altogether exempted from taxation in respect of its franchise or business, and the latter subjected to taxation of its

franchise or business measured by the amount of its capital employed in New York. That State may undoubtedly tax capital employed within its limits by corporations or companies of other States, but it cannot impose restrictions that will necessarily prevent such corporations or companies from selling their goods in New York upon terms of equality with corporations or companies wholly engaged there in manufacturing goods of like kind. By this statute New York says to the manufacturing corporations and companies of other States: "Remove your plant to New York, and the capital employed by you in this State shall be exempt from taxation. But if you persist in keeping your plant where it is already established, your franchise or business shall be taxed upon the basis of the capital employed by you in New York, while the capital of similar corporations or companies wholly engaged in manufacturing in New York, shall be exempt from taxation." Observe, that the statute of New York does not apply exclusively to corporations. It applies equally to companies.

In my judgment, this statute cannot be sustained in its application to the plaintiff in error without recognizing the power of New York, so far as the Federal Constitution is concerned, to enact such statutes as will, by their necessary operation, amount to a tariff protecting goods manufactured in that State against competition in the markets there with goods manufactured in other States. And if such legislation as is embodied in the statute in question is held to be consistent with the Federal Constitution, why may not New York, while exempting from taxation the franchise or business of corporations or companies wholly engaged in carrying on their manufacturing in that State, put such taxation upon the franchise or business of corporations or companies doing business in that State, but not wholly engaged in manufacture there, as will amount to an absolute prohibition upon the sale in New York of the goods manufactured in other States? If each State in the Union should enact a statute exempting from taxation the franchise and business of corporations or companies wholly engaged in carrying on manufacture within its limits, but taxing the franchise or business of corporations or companies

whose manufacturing is carried on in other States, it is easy to see that commerce among the States would be as much at the mercy of discriminating state legislation as it was under the Articles of Confederation, when, as Mr. Justice Story well said, the Government established to conserve the interests of the people of all the States was competent to declare everything, but was without power to do anything. While the authority of the National Government to lay duties upon goods brought from foreign countries into this country so as to build up and protect American industries has been recognized, I had not supposed it was competent for any State of the Union to exert its power of taxation so as to build up and protect its local industries by means of injurious discriminations against the industries of other States. I had supposed that the Constitution of the United States had established absolute free trade among the States of the Union, and that freedom from injurious discrimination in the markets of any State, against goods manufactured in this country, was a vital principle of constitutional law.

The opinion of the court in this case says: "If the *object* of the law in question was to impose a tax upon products of other States, while exempting similar domestic goods from taxation, there might be room to contend that such a distinction was constitutionally objectionable as tending to affect or regulate commerce between the States. But we think that obviously such is not the *purpose* of this legislation. 'Every corporation, joint stock company or association whatever, now or hereafter incorporated, organized or formed under, by or pursuant to law in this State or in any other State or country and doing business in this State, . . . shall be liable to and shall pay a tax as a tax upon its franchise or business into the state treasury annually, to be computed as follows.' It will be perceived that the tax is prescribed as well for New York corporations as for those of other States. It is true that manufacturing or mining corporations wholly engaged in carrying on manufacture or mining ores within the State of New York are exempted from this tax; but such exemption is not restricted to New York corporations, but includes corporations

of other States as well, when wholly engaged in manufacture within the State."

I submit that the validity of state legislation, as affected by the Constitution of the United States, is not to be determined altogether by what is supposed to be the "object" or "purpose" of such legislation, if by object or purpose is meant the motive which controlled members of the state legislature when they enacted such legislation. In a legal sense the object or purpose of legislation is to be determined by its natural and reasonable effect, whatever may have been the motives upon which legislators acted. *Henderson* v. *Mayor of New York*, 92 U. S. 259. This has often been adjudged by this court. "There may be no purpose," this court has said, "upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution;" in which case, "the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void." *Minnesota* v. *Barber*, 136 U. S. 313, 319, and authorities there cited. Can it be doubted that, whatever may have been the ostensible object for which the New York statute was passed, the natural and reasonable effect of the statute is to withhold from goods not manufactured in New York — *and because they were not there manufactured* — that equality in the markets of New York which, we have often said, is secured by the National Constitution to the like products of other States? If the plaintiff corporation can be taxed on its capital employed in New York in the business of selling its goods, manufactured in Michigan, while capital employed in New York by a like manufacturing corporation is exempted from taxation *because, and only because, it is wholly engaged in manufacture in that State*, is it possible to deny that such legislation injuriously discriminates against the manufactures of Michigan in favor of the like manufactures of New York?

My brethren refer to the general rule that it is competent for a State to prescribe the conditions upon which corporations of other States may do business within its limits. But I sub-

mit that that rule, however broadly stated, has no application here. The New York statute has not assumed to prescribe any rule applicable alike to all manufacturing corporations or companies of other States. It exempts from taxation all corporations or companies, whether of New York or of other States, that wholly carry on their manufacturing business in New York. Thus a distinction is made between manufacturing corporations and companies by exempting from taxation on their capital employed in New York those, and those only, that wholly carry on their manufacturing in that State. Besides, this court has never, in any case, adjudged that the power of a State to prescribe the conditions upon which the corporations of other States may do business within its limits can be exerted by legislation that directly, or by its necessary operation, discriminates injuriously against the products of other States in favor of the products of such State. On the contrary, in the cases above cited, it has directly adjudged that such legislation was unconstitutional. It is not necessary for me now to question the soundness of the general proposition that a State may prescribe the conditions upon which corporations of other States may come within its limits for purposes of business. A good deal may depend upon the nature of the business in which the foreign corporation is engaged. But I do question the power of any State to exact a tax from corporations or companies not wholly engaged in manufacturing within its limits, if it exempts from such taxation corporations and companies wholly engaged, and only because they are wholly engaged, in manufacturing in such State. If this be not a sound view of the Constitution, it follows that local tax laws may be so framed as to destroy the principle, frequently announced and often recognized by this court, that the products of the respective States may go into the markets of the country without being discriminated against because of the place of their origin.

The only case which seems to give any support whatever to the opposite view is *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305. But a careful examination of the report of that case and of the opinion shows that counsel did not present, nor did

the court consider or determine, the precise point here presented, as to the authority of the State to exercise the power of taxation so as to place burdens upon goods, the manufacture of other States, solely because they were not produced in the State imposing the taxation.

Some stress seems to be laid upon the fact that the exemption given by the statute to corporations or companies wholly engaged in carrying on manufactures or in mining ores within the State of New York is not limited to corporations or companies of that State; but that the exemption is allowed to such corporations or companies of other States as may carry on their manufacturing or mining business wholly in New York. This view falls far short of meeting the difficulty presented, namely, that the statute, by its necessary operation, injuriously discriminates against goods manufactured in other States, in that such goods are not permitted to go into the markets of New York and compete there upon equal terms with like goods wholly manufactured in that State. This court has often said that the objection that a local statute was invalid, as restraining or binding commerce among the States, was not met by the suggestion that it operated equally upon citizens of the State which enacted it.

I am of opinion that the statute of New York in its application to the plaintiff in error is inconsistent with the power of Congress to regulate commerce among the States, and with that clause of the Fourteenth Amendment, which prohibits any State from denying to any person within its jurisdiction the equal protection of the laws. It is well settled that corporations are persons within the meaning of that clause of the Constitution. *Smyth* v. *Ames*, 169 U. S. 466, 522.

For the reasons stated, I dissent from the opinion and judgment of the court.

Mr. Justice Brown authorizes me to say that he concurs in this dissent.

Mr. Justice White was not present at the argument, and took no part in the decision of the case.